

APPENDIX  
TO  
MINUTES OF EVIDENCE  
TAKEN BEFORE THE  
**ROYAL COMMISSION**  
**ON**  
**MARRIAGE AND DIVORCE**

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Written material submitted to the Commission

- PART I. Private international law.
- PART II. (a) Information as to the financial position of a spouse,  
(b) Property rights of husband and wife.
- PART III. Attachment of wages.
- PART IV. Questions of law of exceptional public interest.
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APPENDIX TO  
MINUTES OF EVIDENCE TAKEN BEFORE  
THE ROYAL COMMISSION ON MARRIAGE  
AND DIVORCE

WRITTEN MATERIAL SUBMITTED TO  
THE COMMISSION

This Appendix contains written statements and other material submitted to the Commission in respect of particular matters within its terms of reference and additional to the material which has already been published in the Minutes of Evidence.

PART I  
PRIVATE INTERNATIONAL LAW

PAPER No. 125

MEMORANDUM SUBMITTED BY PROFESSOR R. H. GRAVESON

At the suggestion of a number of members of the Grotius Society I enclose a copy of a lecture which I delivered to the Society recently, together with other material which is referred to in the lecture<sup>1</sup>, as a memorandum for consideration by your Commission. Certain recommendations are contained in this document relating particularly to:—

1. A widening of the basis of recognition of foreign decrees of divorce.
2. A return to the principle of domicile as the exclusive basis of English divorce jurisdiction.

3. The conferment on a married woman of power to acquire an independent domicile of choice in those cases in which under present law she is allowed to petition for divorce and nullity of marriage on the basis of residence.

In addition to the above I might mention several points for consideration by the Commission:—

<sup>1</sup> "Jurisdiction, unity of domicile and choice of law under the Law Reform (Miscellaneous Provisions) Act, 1949" reprinted from the *International Law Quarterly*, July, 1950 and "The domicile of a widow in the English Conflict of Laws" reprinted from the *British Year Book of International Law*, 1949.

(a) Legislation is required to determine the domicile of an infant child upon the divorce of its parents. Under present law the domicile continues to depend on that of the child's father, but where the parents are divorced and custody of the child is given to the mother it may not be in the interests of the child that its domicile should continue to follow that of its father. It may be suggested that the child's domicile should depend on that of the parent to whom its custody is awarded, or alternatively that its domicile should be of that parent which will best promote the interests and welfare of the child.

(b) One of the statutory grounds for annulment of marriage, introduced by the Matrimonial Causes Act, 1937, is wilful refusal to consummate the marriage<sup>2</sup>. The existence of this ground for nullity creates some incongruity in the law, since it is the only ground for annulment of marriage which must necessarily arise after the marriage has come into existence. In this sense it is considered that it should be treated as a ground for divorce, as is the case in many foreign common law jurisdictions.

<sup>2</sup> New Matrimonial Causes Act, 1950, s. 8 (1) (6).

(Dated 17th September, 1951.)

PAPER No. 126

PAPER READ BY PROFESSOR R. H. GRAVESON BEFORE  
THE GROTIUS SOCIETY ON 4th JULY, 1951

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1. In speaking to you on the recognition of foreign divorce decrees I am very conscious both of the honour of your invitation and of the inadequacy of my response in the form of this paper. I have long thought that the time for an examination of English law relating to this subject was overdue, but for such inspiration as my efforts tonight may claim I owe an acknowledgement to Denis Erwin N. Grünwald, of the Harvard Law School.

2. Very recently I received from him a letter in which he wrote:—

"At the present time, I am hard at work on a paper which I am to give in Australia next summer. The general topic is 'Divorce Jurisdiction and Recognition of Divorce Decrees'. I am trying to handle this on more or less of a comparative basis, taking up the law as it has developed in England, Canada, New Zealand, Australia, and the United States. My general thesis is going to be that although we have gone at it rather

differently, we have all faced a common problem and have come out with pretty much the same solution, although by rather different verbal routes.....

At the conclusion of my article, I plan two points. The first of these will be an effort to answer what I regard as the ill-founded attack of Morris on *Armitage v. Attorney-General*, which appeared in 24 *Canadian Bar Review*, 73.....

My other point will be to argue that English divorces granted under the new statute on the basis of residence should be valid in Canada, Australia, and elsewhere, or vice versa. (They would be valid here anyway, as we would...in almost all cases...regard these resident wives as domiciled where they are resident.)"

3. This was the beginning of a correspondence which disclosed certain differences of opinion, not on the end but on ways and means of achieving it, and I thought the occasion was justified for explaining a few of my own

views. About the same time, on 7th June, the decision of Mr. Justice Burnard in *Maher v. Maher*<sup>2</sup> was reported. There is nothing very striking in principle about this case, but it serves very well to illustrate the incongruity of the situation with which we have to deal, and confirms the need to examine the general problem of recognition of foreign divorce decrees.

4. If I may remind you of the facts, a Mohammedan domiciled in Egypt, while an undergraduate at Cambridge, married a domiciled Englishwoman. At the end of his university course he returned to Egypt, deserting his wife, and forwarded to her through the Egyptian Embassy in London notice of unilateral divorce, by which he purported to have dissolved the English marriage. As is well known, this form of divorce is appropriate to the marriage of a Mohammedan domiciled in Egypt. The wife petitioned in England for divorce on the ground of desertion. The court refused to recognise the Mohammedan divorce as appropriate for the dissolution of an English Christian marriage, but what is of more interest for my purpose tonight is to contrast two statements of the learned judge who decided the matter.

5. The first is this:—

"It is the established rule of English law that domicile is the true test of divorce jurisdiction, and the courts of England will recognise as valid any divorce which is granted by the courts of the country where the parties are domiciled, even on a ground which is not a ground for a divorce in England. The wife acquired by her marriage an Egyptian domicile."<sup>3</sup>

6. The second passage comes at the end of the judgment, in which Burnard, J., said:—

"I am satisfied that the charge of desertion has been established, and I consider that this is a proper case to exercise discretion in favour of the wife. As she has resided in England ever since her marriage in March, 1946, I pronounce a decree nisi."<sup>4</sup>

7. The incongruity of having, on the one hand, an exercise of divorce jurisdiction by the English court on the basis of residence and, on the other, a statement that the true basis of divorce jurisdiction is domicile, is only heightened by the fact that whereas a decree was made on the basis of residence, a divorce made on the basis of domicile was denied recognition.<sup>5</sup>

8. The broad social problem against which the legal position of the recognition of foreign divorce decrees must be examined is familiar to all of us. It is a problem created by the increasing movement of populations, multiplied through the last war, leading to the breakdown of more and more families. Added to this is the increasing mass production of divorces on easier grounds and at a cost within reach of everybody. These circumstances constitute a situation of fact and of social life completely different from that in which the law of recognition of divorce decrees developed, and while the law of divorce jurisdiction has from time to time been modified by statute<sup>6</sup> to mitigate some of the worse hardships, the law of recognition has failed to keep pace and is in need of re-examination. One may see the liberality of the English law of recognition of foreign judgments in other fields; it is, for instance, notable that in *re Deller Settlement Trusts*,<sup>7</sup> Denning, L.J., envisaged the recognition of foreign judgments based on an assumed jurisdiction similar to that under the English R.S.C., O.11.

#### English divorce jurisdiction

9. It will help in approaching this subject if we may bear in mind the differences which exist between the English rules of jurisdiction in divorce in English courts and the English law of recognition of foreign divorce decrees.

10. There is no time to deal with the question of decrees in other matrimonial causes, particularly nullity of marriage.

11. The English law of divorce jurisdiction was laid down for it somewhat incongruously by the Judicial Com-

mittee of the Privy Council on an appeal from Ceylon involving the application of Roman-Dutch law. This was, of course, the decision in *Le Mesurier v. Le Mesurier*,<sup>8</sup> in which the domicile of the parties at the institution of the proceedings was declared the only basis of jurisdiction in divorce. To deal with hardships arising from this principle, first the courts and later the legislature attempted to devise remedies: the courts in the well-known case of *Stanhurst v. Stanhurst*<sup>9</sup>; *De Montagu v. De Montagu*<sup>10</sup> and *Ardagh v. Attorney-General*<sup>11</sup>; and Parliament in the Matrimonial Causes Act, 1937, the Matrimonial Causes (War Marriage) Act, 1944, and the Law Reform (Miscellaneous Provisions) Act, 1949. Most of the provisions of these statutes relating to matrimonial causes are now consolidated in the Matrimonial Causes Act, 1950.

12. The main effect of this legislation is to give the English court jurisdiction in divorce in favour of a wife whose husband is domiciled outside the United Kingdom, provided the wife has resided in England for three years immediately before the commencement of proceedings.<sup>12</sup> Similar legislation to deal with the same hardship case was passed in most of the British Dominions from about 1919.<sup>13</sup> In all cases the principle of subjection of the wife's domicile to that of her husband has been maintained, chiefly because of the Privy Council's reactionary decision in *A.G. for Alberta v. Cook*.<sup>14</sup> The maintenance of this principle of the unity of domicile of husband and wife appears to be the only reason for establishing residence as a basis of divorce jurisdiction and as an exception to the main principle stated by the Privy Council in 1895.<sup>15</sup> It may well be, as we have said elsewhere,<sup>16</sup> that both for the purpose of maintaining an exclusive principle of domiciliary jurisdiction in matters of status, such as divorce, and of ensuring international recognition for divorce decrees in what might be called the hardship cases, it would have been better and would still be better to allow the wife in such cases to have an independent domicile, the normal principle applying in the United States of America.

13. This problem is associated with a second subsidiary but important question which has also been discussed elsewhere.<sup>17</sup> Because English courts always apply concepts of English internal law to the characterisation of domicile<sup>18</sup> it is doubly important that they should distinguish that process from the independent question of choice of what law should govern capacity to acquire a domicile. The juridical independence of these two questions has not yet been recognised by the English courts, chiefly because the direct issue has never come before them as a reported case.<sup>19</sup> An example may serve to illustrate the need for such a distinction. It may well be that a deserted wife living in England whose husband is domiciled in one of the United States, not only has the capacity both by the law of the last common domicile of herself and her husband and by that of her husband's present domicile (if that is different) to acquire an independent domicile of choice in England, a domicile in all respects satisfying the English concept of domicile, but by the fact that she has exercised that capacity and by the law of her former domicile is therefore domiciled in England, would be prevented from petitioning for divorce in the American courts where according to the present state of English law she would still be domiciled. It has been suggested elsewhere that the law of a person's existing domicile is the most appropriate system to determine capacity to change such domicile.<sup>20</sup>

#### Recognition in England of foreign divorce decrees

14. It will be recalled that this is traditionally regarded as being always a question of choice of jurisdiction and never one of choice of law, and that the jurisdiction is one based exclusively on domicile in the English sense. In other words, an English court called on to recognise

<sup>2</sup> [1951] A.C. 517.

<sup>3</sup> [1951] P. 46.

<sup>4</sup> [1951] P. 154.

<sup>5</sup> [1950] P. 115.

<sup>6</sup> Corresponding provisions in the Act of 1949 are considered in *3 Int. Law Quarterly*, 371 ff.

<sup>7</sup> *Id.*, 373. See Read, *Recognition and Enforcement of Foreign Judgments*, 218-231.

<sup>8</sup> [1906] A.C. 444.

<sup>9</sup> *In Le Mesurier v. Le Mesurier* (above).

<sup>10</sup> *3 Int. Law Quarterly*, 378.

<sup>11</sup> *3 Int. Law Quarterly*, 149 ff.

<sup>12</sup> *Re Morris*, [1950] P. 211; *Re Anselmi*, [1950] Ch. 692.

<sup>13</sup> But see *Re Woodhead, dead*, [1950] 1 All E.R. 194, discussed in *XXVI B.Y.I.L.*, 207 ff.

<sup>14</sup> See *3 Int. Law Quarterly*, 160 ff.

<sup>15</sup> *Id.*, 160 ff.

<sup>16</sup> *Id.*, 160 ff.

<sup>17</sup> *Id.*, 160 ff.

<sup>18</sup> *Id.*, 160 ff.

<sup>19</sup> *Id.*, 160 ff.

<sup>20</sup> *Id.*, 160 ff.

a foreign divorce decree is concerned only with the question of whether the foreign court has jurisdiction, and not whether the grounds on which the foreign court grants a decree are frivolous or in any way different from English grounds of divorce, and that this is so even though an English marriage is involved.<sup>20</sup>

15. The strength of this principle was vividly illustrated in 1921 when in *Keyer v. Keyer*<sup>21</sup> it was held that an Indian divorce of British subjects resident but not domiciled in India and made in accordance with the practice followed in that country since 1859 was void. In a colonial empire this created a special problem for which legislation was passed to allow recognition of divorces of British subjects resident abroad but domiciled in England or Scotland.<sup>22</sup> In passing this legislation Parliament made the first inroad into the domiciliary principle, to which we shall have to refer in a moment.

16. Beyond this special and statutory exception, the only other inroad which is generally recognised into the principle of jurisdiction based on domicile arises from the effect of *Armistage v. Attorney-General*<sup>23</sup>; but since the rationale of this rule is that English courts will recognise a decree which is recognised as adequate by the courts of the domicile of the parties, it can scarcely be considered to constitute an exception of substance to the principle of exclusive recognition of decrees of the domicile.

17. From a comparison of the English rules of jurisdiction with those relating to recognition of foreign decrees, it thus appears that, starting from a common point at the end of the 19th century, the rules of recognition have remained static while the rules of jurisdiction have developed to meet social needs. When this fact is coupled with the two other principles of English law which we have mentioned relating to the characterisation of domicile and the unity of domicile of husband and wife, it is clear that many foreign divorce decrees would not be recognised in England, even though pronounced by a foreign court on the same basis of jurisdiction and for the same cause as those found in English law. English law cannot be acquitted of responsibility for creating in this way unnecessary cases of limping marriages in which persons divorced by their personal law are regarded as still married in England. This is the kind of situation which it is the purpose of the conflict of laws to prevent or remedy, not to create or perpetuate.

#### Problems of recognition

18. The main problems of recognition which arise from the present state of English law are four:—

##### (a) Non-recognition of decrees based on nationality

Jurisdiction in divorce in many civil law countries is based on nationality, not on domicile, despite the increasing tendency on the Continent in favour of domicile. In so far as decrees on this basis would be denied recognition in England, it would appear to be for no better reason than the fact that English law makes domicile the basis of personal law, while civil law systems generally have chosen nationality. However, as we may see in a moment, the position may be less depressing than it appears.

##### (b) The dual test for interpersonal conflict of laws cases

Domicile, although a basis for the granting of a foreign decree, is in the case of interpersonal conflict of laws not a complete basis. Domicile in the English sense represents merely the first part of a cumulative choice of jurisdiction rule, the second part of which is related usually<sup>24</sup> to adherence to one particular religion or another, as in the case of *Maher v. Maher*<sup>25</sup> to which reference has already been made.

##### (c) Recognition of non-judicial decrees

A third and minor problem, which is also partly illustrated by the same case, arises where a decree of divorce is non-judicial, even though it may have been granted by the appropriate authorities in the country of the parties' territorial domicile.

##### (d) Non-recognition of foreign decrees based on residence

In this last problem we find the widest divergence between the English law relating on the one hand to jurisdiction of English courts and on the other to the recognition of decrees of foreign courts.

#### Considerations of principle

19. In approaching these problems of recognition of foreign decrees and the many subsidiary ones in this branch of law, it is desirable to be clear on the broad base of legal principle which they involve. Lord Justice Brett in *Niboye v. Niboye*<sup>26</sup> described marriage as a status, and Lord Justice Scott in *Re Luck*<sup>27</sup> described the universality of status as its most important characteristic. The primary purpose of a body of law relating to the recognition of judicial acts affecting status must surely be to ensure the universal recognition of all such acts which either on grounds of jurisdiction or of substantive law can be considered justified in dealing with the status. In order to achieve this object we shall have to take a wider view of the conflict of laws than that it is merely a projection into space of English domestic law. We shall have to realise more fully than we do that the concept of domicile is subsidiary to the concept of personal law, and is merely one way of discovering it. We shall have to realise further that substantive law has considerably greater importance to the parties and to society at large than questions of jurisdiction and procedure, important as these are. Within the broad principle of status as eloquently expressed by the late Lord Justice Scott and with these considerations in mind, let us now look for a moment at each of the four main problems mentioned above.

##### A. Decrees based on nationality

20. The concept of English justice, which we have met elsewhere<sup>28</sup> lies at the base of the English conflict of laws, cannot be satisfied by denying recognition to divorce decrees of the courts of the personal law of parties merely because their personal law, like that of most Europeans, depends on nationality rather than on domicile. The reasons for granting recognition to such decrees are too strong and too obvious to need reciting here. The general basis of recognition which we find emphatically stated by the authorities in this branch of law is well represented by the words of Professor Cheshire,<sup>29</sup> who writes, "Just as the English courts refuse to entertain a suit for dissolution of marriage unless the parties are domiciled in England, so do they deny that anything short of domicile enables a foreign court to pronounce a decree that will be recognised in England . . . Neither residence, nor nationality, nor the submission of the respondent to the proceedings suffices to render a court competent". As a general proposition none would dispute this statement. But just as exceptions to the principle of domicile exist in English jurisdiction, so one may find some ground for qualifying this basis of recognition of foreign decrees. Brett, L.J., in his dissenting judgment in *Niboye v. Niboye*,<sup>30</sup> realised clearly enough that both domicile and nationality were bases of jurisdiction over personal status. Because in our legal system an ounce of precedent is worth a ton of reason, we may rejoice to realise that some authority already exists for the recognition by our courts of decrees based on nationality as a ground of jurisdiction. In *Mezger v. Mezger*<sup>31</sup> an English court recognised the validity of a foreign divorce of nationals of the foreign forum in circumstances which can fairly be regarded as constituting such recognition a *ratio decidendi*. As this decision is usually cited in support of a different point<sup>32</sup> we may take a moment to refer to the facts.

21. *Mezger v. Mezger* was an appeal to a Divisional Court from a refusal of justices to revoke a maintenance

<sup>20</sup> *Powderton v. Haples*, (1899) 1 Ch. 781; *Buter v. Buter*, (1906) P. 208.

<sup>21</sup> [1900] P. 204.

<sup>22</sup> Indian Divorces (Validity) Act, 1921; Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940; Colonial and Other Territories (Divorce Jurisdiction) Act, 1930. The last-named provides for recognition in England of divorces and ancillary decrees of courts of those colonies and trust territories to which the Act is extended by Order in Council and applies to British subjects domiciled in any part of the United Kingdom. On the operation of the earlier Acts, see Dicey's *Conflict of Laws* (6th ed.), 379-380.

<sup>23</sup> [1900] P. 135.

<sup>24</sup> Exceptionally such a personal law is non-religious, e.g. Indonesian Adat law—see Professor Kolleijn's comments, 4 *Int. Law Quarterly*, 307.

<sup>25</sup> [1951] 2 All E.R. 37.

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<sup>26</sup> [1870] 4 P.D. (C.A.) 1.

<sup>27</sup> [1945] Ch. 864.

<sup>28</sup> *Conflict of Laws*, 6.

<sup>29</sup> *Private International Law* (3rd ed.), 679-80.

<sup>30</sup> [1878] 4 P.D. 1.

<sup>31</sup> [1936] 3 All E.R. 130.

<sup>32</sup> That of a wife's entitlement after divorce to maintenance awarded to her under the order of an English court before the divorce.

order which they had made against a German subject in favour of his wife. The husband pleaded that since the making of the order the marriage had been dissolved on his petition by a German court. Although the parties were living in England, there was no conclusive evidence of their domicile, although there was a hint of a presumption of continuance of an undefined domicile of origin. Sir Boyd Merriman, P., stated:<sup>22</sup> "I think not merely that there was material on which the foundation, the validity of the decree, was laid, but that the justices were bound on the material available to find that this was a good and valid decree throughout the world of dissolution of marriage by a court of competent jurisdiction in respect of two parties who were amenable to the jurisdiction of that court." To like effect are the words of Langton, J., the other member of the court, in expressing his concurrence in these terms:<sup>23</sup> "I agree with the judgment that has just been delivered because I am satisfied that when once the German court, a court of competent jurisdiction dealing with its own nationals, both of whom had agreed to submit their disputes to that tribunal, had arrived at a decision, it was a clear, final and binding decision upon all the world." This little wedge of precedent has great possibilities for widening the English basis of recognition of foreign decrees.

22. The authority cited deals with the case of a common nationality of husband and wife. There is justification for following French precedent in the well-known *Ferrari* case<sup>24</sup> (where husband and wife have different nationalities), and the American practice recorded in a thousand cases (where husband and wife have different domiciles), for recognising the effectiveness of a decree of dissolution pronounced by the courts of the nationality or domicile of either party, whether or not the marriage is regarded as indissoluble by the personal law of the other party, as it was in the case of the Italian husband, *Ferrari*. The justification in principle for this view is simple and satisfying. It is that marriage is a single institution though it concerns two persons, and the destruction of the institution by the courts of either party is no less effective than its destruction by a court common to them both. The freeing of one party from the bond of marriage logically frees the other party also, since by the relational nature of marriage a person cannot be married unless he or she has a wife or husband. This is a case in which law should follow logic. It is considered that the English courts could adopt this practice without violating existing precedent, at least so far as concern decrees affecting persons who have no English domicile. The exercise of jurisdiction by our courts on the basis of residence only of one party (the wife)<sup>25</sup> is possible disregard of the personal laws of both parties to the marriage, represents the far more extreme counterpart in English jurisdiction. Even the traditional English jurisdiction on the basis of domicile of both parties is only achieved through the legal attribution to the wife of the domicile of the husband, which may have no substance or justification on the facts of the particular case.<sup>27</sup>

#### B. Decrees on the basis of a personal religious law

23. On rare occasions the English courts have had to consider the validity of foreign divorces made in accordance with the personal religious law of the husband.<sup>28</sup> In none of these cases can it be said that the court has seriously attempted to solve the general problem of the clash between international or interlocal and interpersonal conflict of laws. Because international and interpersonal conflict of laws are framed in different dimensions, solution of problems involving both systems presents peculiar difficulties which cannot be considered at this point. What is clear, however, is that for the recognition of divorce decrees of persons domiciled outside England and professing a religion which exercises or permits its own jurisdiction in matters of divorce, a dual test must be applied,

being first that of domicile in the English sense and secondly that of religion according to the law of the domicile as ascertained by the first test. The importance of this double test lies in the fact, as stated by Vanecko Reading, C. J., in the *Haumenwath Marriage* case<sup>29</sup>, that "An Englishwoman or a woman domiciled in England who marries in England a person domiciled . . . out of the realm of England, acquires by the status of marriage the domicile of the husband and is subject to the law of that domicile, but she does not acquire his religion or become subject to the laws of his religion except in so far as they are the law of his domicile, and then to that extent only". The effects of marriage are thus limited to those arising from principles of international conflict of laws. No difficulty would presumably arise over the recognition by English courts of foreign decrees of divorce based on a personal religious law of the parties when that is also the law of their territorial domicile and the marriage according to the law of the place of its celebration is of a kind to which such a form of divorce is appropriate. English courts now recognise, as the Judicial Committee of the Privy Council has long done, that within the British Commonwealth polygamous marriages are the rule rather than the exception.<sup>30</sup> The extent of recognition in England of decrees or unilateral acts dissolving such marriages is, subject to one possibility mentioned below, considered adequate. A social problem is involved which is familiar to all concerned with orientals resident in this country, a problem typified by the case of the Egyptian undergraduate at Cambridge who married an English girl for the duration of his residence in England.<sup>31</sup> A pragmatic solution to this clash between international and interpersonal conflict of laws has been found by the English courts through importing into the law governing dissolution of marriage that governing its creation, so that an English (and presumably any other country's) type of Christian marriage<sup>32</sup> will not be recognised by English courts as dissoluble by a method considered inappropriate to that type of marriage. In this one respect the courts have come near to establishing in respect of domiciled English women a rule of interpersonal conflict of laws not based directly on religion but indirectly on the Christian type of marriage. English courts, in the words of Boardman, L.J.,<sup>33</sup> are not prepared to "encourage and sanction the purely temporary unions of English women and foreigners professing the Mohammedan religion during their limited residence in this country". One need not deplore a difference in this respect of the rules of recognition of foreign divorces, since the institutions which are being dissolved have little in common beyond their name.<sup>34</sup> There seems no reason on principle why a person subject to an international system of conflict of laws, for example, a domiciled Englishwoman, should not be able to subject herself voluntarily to an interpersonal system.

24. Accordingly it would seem justifiable by application of the principles of English law developed in cases of this kind to distinguish two types of situation. The cases show that the mere fact of marriage of a domiciled Englishwoman to a Mohammedan (for example) domiciled in an oriental country has no further effect than to confer on the wife the husband's territorial domicile in the English sense. At this stage only a type of divorce appropriate to the general pattern of international conflict of laws will be recognised in England. But it was recognised in *Cauley v. Cauley*<sup>35</sup> that a Western European might in fact wish to become assimilated into an oriental pattern of life, and a second situation may well arise in which the wife by some voluntary act, such as the adoption of her husband's religion, may after the marriage also subject herself to an interpersonal system of conflict of laws. In such a situation the case for denying recognition to an act of divorce valid by both the territorial domiciliary law and the religious personal law is less strong. It is doubtful whether the character of the Christian type of marriage should prevail so far as to prevent its unilateral dissolution in such circumstances.<sup>36</sup>

<sup>22</sup> *R. v. Haumenwath Superintendent Registrar of Marriages*, ex p. *M. v. Haumenwath*, (1917) 1 K.B. 634, at 643.

<sup>23</sup> *Sir v. Paine v. Sir v. Paine*, (1946) P. 67; *Shahid v. Shahid*, (1946) P. 122.

<sup>24</sup> *Maher v. Maher* 2 All E.R. 37.

<sup>25</sup> As defined by Lord Penzance in *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130.

<sup>26</sup> In *Maher v. Maher*, (1951) 2 All E.R. at 38.

<sup>27</sup> See remarks of Lord Broughton in *Warrender v. Warrender* (1935), 2 C.L. & B. 488.

<sup>28</sup> (1919) A.C. 145.

<sup>29</sup> Mohammedan law has a more effective solution in absolutely prohibiting the marriage of a Moslem woman to a Christian.

<sup>22</sup> (1936) 3 All E.R. at 132. See also *Paine v. Paine*, (1936) P. 80, on similar facts, though it is not clear whether the French decree was recognised on the basis of domicile or nationality. See also *Shahid v. Shahid* in the cases of *De Maana v. De Maana*, *Ther, 31st March, 1951*, and *Gilbert v. Gilbert*, (1939) P. 337, in which the English court recognised a French decree of nullity of an English marriage of French nationals.

<sup>23</sup> *Id.* at 136.

<sup>24</sup> *Daloz*, 1922, L. 139; *Cheset*, 1922, 314.

<sup>25</sup> *Macdonald* *Cases Act*, 1950, S. 18.

<sup>26</sup> *E.g.*, *Lord Advocate v. Jeffrey*, (1952) 1 A.C. 146; *Att.-Gen. v. Allen*, *supra*, (1952) A.C. 444.

<sup>27</sup> *E.g.*, *R. v. Superintendent Registrar of Marriages for Haumenwath*, ex p. *M. v. Haumenwath*, (1917) 1 K.B. 634; *Maher v. Maher*, (1951) 2 All E.R. 37.

## C. Recognition of non-judicial divorces

25. These may be (i) unilateral; (ii) consensual; (iii) pronounced by some non-judicial authority of the State, whether legislative or executive; or (iv) religious.

26. We may shortly dispose of (i) and (iv). The English rules of recognition developed in relation to marriages in England of Englishwomen with Mohammedans have already been discussed, and it only remains to add that in the English judicial tradition these principles would probably be applied to the recognition of any unilateral divorce, the decisive factor being the monogamous or polygamous nature of the marriage subject to the act of divorce. The fourth case, religious divorces, would seem to fall either into the category of unilateral divorces, in which some religious official takes a minor part; or into the broad class of judicial divorces, as in Rabbinical law,<sup>47</sup> and as in English law before 1858<sup>48</sup> in respect of matrimonial decrees other than outright divorce. Special comment therefore appears unnecessary. Let us look for a moment at the second and third classes, consensual divorces and those pronounced by a non-judicial authority.

## (ii) Consensual divorces

27. Despite the fact that Blackstone had said that English law regarded marriage in no other light than as a civil contract,<sup>49</sup> Bentham agreed with him in advocating contracting-out of marriage as the logical counterpart to contracting-in.<sup>50</sup> He did not have to look to classical Roman law for a precedent, for contemporary ones existed for him both in the Prussian Code and in French Revolutionary practice.<sup>51</sup> Collusion might thus be either a condition precedent or an absolute bar to divorce, depending on one's point of view, but even in an age of individualism the Church of England ensured that agreement between the parties was given the latter character when Bentham's proposals for outright divorce by secular authority took effect in the Matrimonial Causes Act of 1857. Where the English court is asked to recognise a foreign judicial decree of divorce, collusion between the parties does not appear to constitute an objection to recognition.<sup>52</sup> Should, therefore, the further fact that a marriage may be dissolved without judicial intervention prevent recognition of the divorce by English courts?

28. Although the question does not appear to have been directly answered, it arose indirectly in respect of a Russian marriage in the familiar case of *Nachimson v. Nachimson*.<sup>53</sup> Remembering that the only issue before the Court of Appeal was whether the marriage, dissoluble at the date of its creation by mutual consent notified to an administrative official, constituted a Christian type of marriage for purposes of English divorce jurisdiction, one may nevertheless fairly deduce from remarks obiter that English courts would recognise a consensual divorce, even of a Christian type of marriage. Romer, L. J., observed, for example, "A husband and wife must be the best judges of whether their tempers have proved to be incompatible, and if they both agree that it is so, I could well understand the ministerial duty of recording their agreement and of giving effect to their desire being entrusted to some official other than a judge. If there should in truth be a country possessing such a law I am not prepared to say that a marriage celebrated within its territory is not a Christian marriage". On the authority both of this case and of *Wurdester v. Wurdester*<sup>54</sup> the character of a Christian marriage is unaffected by the grounds or method of its dissolution, which are independent questions that are governed by a different choice of law rule. In the words of Romer, L. J., in the *Nachimson* case, "... the dissolubility or indissolubility of a marriage in turn depends upon the domicile of the parties to it at the time it is sought to dissolve it."<sup>55</sup> Subject in the first place to the qualification mentioned in the case of polygamous marriages, and in the second place to an extended concept of the personal law which would embrace nationality where necessary, as an alternative to domicile, neither reason nor precedent exists to prevent the recognition in England of foreign consensual divorces.

29. One objection on principle, however, remains to be overcome. Marriage is a status because it is an institution of interest not merely to the parties, but to the society of their personal law. Because of this social interest English courts in the first place give exclusive jurisdiction over the status to the courts of the personal law, and generalise the normal practices of judicial divorces into a principle that some sort of a state organ must intervene to cause any change of status. The second part of this composite principle was applied as the less satisfactory of the two reasons for decision in the *Hammerworth Marriage case*<sup>56</sup> and has been subjected to criticism by Professor Cheshire<sup>57</sup> and others which may well have led the court a few months ago in *Mohr v. Mohr*<sup>58</sup> to concentrate on the second reason for denying recognition to a divorce by *nikah*, namely, that such a form of divorce was inappropriate to an English marriage. To ensure control by the personal law over questions of domestic status it is not essential, however, for English courts to decide for the personal law how it should give effect to the social interests concerning its domiciliaries or nationals.<sup>59</sup> This more liberal view represents the sense and feeling of the Court of Appeal in *Nachimson's* case.<sup>60</sup> If the English courts deny recognition to consensual divorces in accordance with the personal law of the parties and made within the territory of such personal law, they must also logically create an exception to the principle of exclusive reference to the personal law of jurisdiction over the marriage status. It is considered that they are as unlikely to do one as the other. Consensual divorces valid by the personal law of the parties should be and, it is submitted, would be recognised by English courts.

## (iii) Non-judicial State divorces

30. Constitutional principles of the sovereignty of Parliament and the former English practice of granting divorce only by private act of Parliament virtually estop the English courts from denying validity to foreign legislative decrees of divorce. The practice of exclusively legislative divorce, formerly obtaining in England and many American States, still exists in one or two countries, such as the Province of Quebec, and no reason exists for supposing that an English court would deny recognition to any such decree affecting parties domiciled in the country where it was pronounced. The difference in the origin of state charged with divorce often conceals a similarity of procedure, which in most cases is of a judicial, not a legislative nature.

31. Difficulties arise, however, in considering the international limits of the legislative power of a state in relation to persons present within its territory. So far as divorce is concerned, we may assume on principle that domicile within the country would suffice. This leaves unanswered the questions of nationality, residence and mere presence, whether of both parties or only one. If we may assume that no greater recognition should be accorded to a foreign legislative than to a judicial decree the same reasoning will apply to these problems in their legislative as in their judicial aspect. It is a minor presumption of the English law of the interpretation of statutes that they shall if possible be construed in accordance with private international law, and a major presumption that foreign law is the same as English unless the contrary is expressly proved.<sup>61</sup> On these grounds English courts would, it is submitted, apply to foreign legislative divorces the same principles of conflict of laws as they apply to the recognition of foreign judicial decrees. But in the case of legislation a stronger argument of public law exists for recognising the authority of a country over its own nationals, and again it is considered that an English court should and probably would recognise a foreign legislative decree dissolving the marriage of nationals of the foreign country by whose law the personal law of the parties depended on nationality, even though (to take an extreme case) they had married and were at the time of the decree domiciled in England. This view is not confined to the question of legislative decrees, though for the reason stated it is, perhaps, stronger in their case than in that of judicial decrees.

<sup>47</sup> *Sanson v. Sanson*, (1904) A.C. 1007 (P.C.); cf. *Proyer v. Proyer* (1900), 42 T.L.R. 281 and *Spawek v. Spawek* (1930), 46 T.L.R. 243.

<sup>48</sup> *Matrimonial Causes Act*, 1857.

<sup>49</sup> *Commentaries on the Laws of England*, I, Ch. XV, p. 433 (2nd ed.).

<sup>50</sup> *Theory of Legislation* (11th ed.), pp. 225 ff.

<sup>51</sup> *Id.*, p. 229.

<sup>52</sup> *Crowe v. Crowe*, (1937) 2 All E.R. 723.

<sup>53</sup> (1930) p. 217.

<sup>54</sup> (1835), 2 Cl. & Fin. 488.

<sup>55</sup> Compare the association of these two matters in the polygamous marriage cases referred to above.

<sup>56</sup> (1917) 1 K.B. 634.

<sup>57</sup> *Op. cit.*, 484 ff.

<sup>58</sup> (1951) 2 All E.R. 37.

<sup>59</sup> Cheshire, *op. cit.*, 484 and Dicey, *op. cit.*, 371, express a similar view in terms of procedure and method of dissolution.

<sup>60</sup> (1930) p. 217.

<sup>61</sup> *Mohr v. Mohr* (1893), 3 Bp. 163; *De Renesse v. De Renesse*, (1943) P. 100.

The problem rests fundamentally on a duality of personal laws, i.e., the parties are nationals of country A, by whose law the personal law depends on nationality, but they are domiciled in country B, by whose law domicile is the test of personal law. In such circumstances both A and B have an equal claim to regulate personal status. It is urged that the act of either country with that object should be recognised as effective in the other.<sup>62</sup> Beale<sup>63</sup> affirmed that jurisdiction to grant legislative divorces was the same as that for judicial divorces, apparently because the procedure either was or should be a judicial hearing; but it would seem that his affirmation could stand on the basis of general principles of recognition and jurisdiction independently of any question of procedure.

32. The internal organisation of a legal system may justifiably designate an executive or administrative authority as the appropriate body for dissolution of marriage.<sup>64</sup> Few instances of this kind exist today in western civilisations, though one cannot fail to refer to the exercise of this power by the King of Denmark (whose divorces have been recognised in the German and Swiss courts<sup>65</sup>); and to the pre-1944 practice in Soviet law. The considerations affecting the international validity of such decrees do not differ materially from those mentioned in respect of legislative divorces. It is a matter of internal organisation of the country of the parties' personal law whether a divorce is pronounced by one or another organ of government, and no reason can be seen on principle for distinguishing between them from the point of view of recognition. The remarks of Romer, L.J., in the *Nashville* case<sup>66</sup> lend support to this view.

#### D. Residence

33. This brings us to the last main problem—that of the foreign decree founded on residence.<sup>67</sup> To overcome the hardship caused to a deserted wife by the principle of subjection of her domicile to that of her husband, Commonwealth countries since 1919 and England since 1937 have by statute sought a remedy by conferring divorce jurisdiction on the basis of residence.<sup>68</sup> This is a double departure from the principle of exclusive domiciliary control of domestic status, since not only have the courts of residence jurisdiction but, what is more significant, the substantive law of the country of residence is applied. The effects of this jurisdiction appeared in an acute form in *Zenell v. Zenell*<sup>69</sup> in which the English court, applying English law, pronounced a decree of divorce between two Italian nationals domiciled in Italy whose marriage was by their personal law indissoluble. Throughout the Dominions react to the American solution of the problem by giving to the wife an independent domicile in those cases in which English and Dominion statutes give jurisdiction on the basis of residence was barred by the tragic decision of the Privy Council in *A.G. for Alberta v. Cook*.<sup>70</sup> The most conspicuous development in divorce jurisdiction has accordingly been the growth of an exception to exclusive domiciliary jurisdiction under the Acts referred to above. The relevance of this development of jurisdiction lies in its increasing remoteness from the traditional and static rules of recognition which still refer to domicile (or nationality in the instance cited above) but never to residence. The problem may be presented in its most striking form by taking two sections of the same English statute, the Law Reform (Miscellaneous Provisions) Act, 1949. Section 1 of that Act, enlarging the scope of a provision of the Matrimonial Causes Act, 1937, and now embodied in the Matrimonial Causes Act, 1973<sup>71</sup> allows a wife whose husband is domiciled outside the United Kingdom to petition for divorce in England provided she has resided in England for three years immediately preceding the presentation of the petition. Section 2 of the Act of 1949 confers on Scottish courts a similar jurisdiction to deal with the same problem of

a wife resident in Scotland. Under existing rules of recognition neither will Scottish decrees under the Act be recognised in England nor may English decrees expect recognition in Scotland. One may well envisage a climax to this fantastic situation in which the House of Lords, sitting as the highest English Court of Appeal, is forced to deny recognition to its own judgment when sitting as the highest Scottish Court of Appeal in concurring adjoining sections of the same statute, whose only substantial difference lies in their territorial application. To say that the House would be unlikely to do this is in the nature of an understatement. But the consequence will necessarily be some widening of the principle of recognition, if only through the indirect method of applying the golden rule to the interpretation of this statute. Rabel<sup>72</sup> thought that English courts would recognise a foreign decree pronounced under circumstances similar to those set out in the Matrimonial Causes Act, 1937,<sup>73</sup> that is, on the basis of jurisdiction of the courts of the last matrimonial domicile before the husband's desertion. Dean Griswold maintains (in correspondence) that recognition would be given mutually under the Acts of 1949 and 1950, and asks, if recognition be granted within the United Kingdom, why should it not be granted throughout the British Commonwealth where similar legislation exists? De principle, he argues with force, the substantive law of divorce jurisdiction has developed: why should not the conflict of laws relating to recognition develop accordingly? Assuming that statute law throughout the Commonwealth continues to follow its present pattern, his argument is unanswerable within the limits he has set. None would deny the desirability of such mutual recognition; as an interim and partial remedy for the situation it is to be welcomed. But two relevant questions arise. Does it yet represent English law? and is it the most satisfactory solution to this particular problem?

34. Until the House of Lords faces the uncomfortable dilemma which we have just conceived for it, the answer to the first question must be "No". No authority exists in favour of recognition of a foreign decree based on residence, while many decisions limit recognition to decrees based on domicile. Even the rationale of *Arridge v. Art-Ges*<sup>74</sup> is against the recognition of decrees based on residence; for only through reference to the domiciliary law of the parties was the English court able to recognise the decree of a court other than that of the parties' domicile. Furthermore, in establishing a case of jurisdiction based on residence in the Matrimonial Causes (War Marriages) Act, 1944, Parliament considered it necessary to make special provision for recognition abroad of decrees under the Act. By Section 4 of this Imperial statute decrees made under it or under similar legislation in the British Commonwealth shall be recognised in all British courts. But an order in Council is first required to declare the relevant law similar to that in the Act, and such an Order shall not be made in respect of the Dominions or their Provinces "unless His Majesty is satisfied that adequate provision is made by the law of that Dominion, Province or State forming part of a Dominion, or British protected state, for the recognition by the courts thereof of the decrees and orders which are by virtue of this subsection to be recognised to the extent provided for by this subsection in British courts other than Dominion courts".

35. But no such general provisions for recognition exist, simply and ironically because the Dominion law of recognition follows the English cases restricting it to domicile, and because that law is still submerged in the disaster of *A.G. for Alberta v. Cook*.<sup>75</sup> Special statutory provisions have accordingly been made for the mutual recognition of decrees of this kind in Australia, South Africa and New Zealand.<sup>76</sup> Such a statutory provision, needless to say, would have been unnecessary had recognition been granted under the normal rules of conflict of laws, and its inclusion in this one statute refutes the existence of any general principle of recognition on the ground of residence.

36. The second question may be shortly answered, as we have already dealt with the point elsewhere,<sup>77</sup> though the answer goes beyond the limited question of recognising decrees on a basis of residence to the whole question

<sup>62</sup> Possible primary variations of this situation are (a) that the parties have different domiciles, different nationalities, or both (possible application of four personal laws); (b) that they are domiciled in country A (nationality the basis of personal law), and nationals of country B (domicile the basis of personal law).

<sup>63</sup> *Treatise on the Conflict of Laws*, Vol. I, 471.

<sup>64</sup> The Hague Convention on Divorce (Article 7, para. 2) provided for recognition of such forms of divorce.

<sup>65</sup> Rabel, *Conflict of Laws*, I, 485-7.

<sup>66</sup> [1930] P. 217.

<sup>67</sup> The writer has considered this question more fully in *3 Int. Law Quarterly*, 371 ff.

<sup>68</sup> *Id.*, op. cit.

<sup>69</sup> [1948], 64 T.L.R. 356.

<sup>70</sup> [1930] A.C. 444.

<sup>71</sup> S. 18.

<sup>72</sup> *Conflict of Laws*, I, 464.

<sup>73</sup> S. 13.

<sup>74</sup> [1906] P. 135.

<sup>75</sup> [1930] A.C. 444.

<sup>76</sup> S.R. & O. 1946, 2019; 1948, 111. See Dicey, *op. cit.*, 380-381.

<sup>77</sup> *3 Int. Law Quarterly*, 378.

of jurisdiction and recognition. If the personal law is to have any real meaning in a world of broken marriages, jurisdiction over domestic status and a *fortiori* recognition of divorce decrees must be related exclusively to that personal law. But the need today is for a liberal interpretation of the concept of personal law with a basis of substance and reality which, it is suggested, should be applied on a recognition of the following six principles:—

(i) That the personal law may be founded on domicile or nationality and in either case (though normally only in the case of domicile) it may require the application of the additional choice of law rule of an interpersonae conflict law normally of religious character.

(ii) That the nature of the decree must be appropriate to the type of marriage which it purports to dissolve, the type of marriage being determined by the law of the place of its celebration.

(iii) That husband and wife may be governed by different personal laws, and that though in English law a wife at present almost invariably has the same domicile as her husband, under other systems, particularly those of the United States, she does not. That the question of whether a wife has a separate domicile (or nationality) is independent of whether she has a domicile (or nationality) in the English sense. That in this connection English courts should establish a choice of law rule to govern capacity to acquire a domicile.<sup>35</sup>

(iv) That the effect of the decision of the Privy Council in *Att-Gen. for Alberta v. Cook*<sup>36</sup> be reversed by Imperial statute and a wife be empowered under specified circumstances of hardship to acquire an independent domicile of choice in accordance with the ordinary rules of domicile applying to an unmarried person of full age. By this means the hardship cases for which the English Acts of 1937, 1944, 1948 and 1950 provided a divorce jurisdiction based on the wife's residence could be replaced by a provision which would achieve at least as good a result, with added assurance of international validity for decrees of the court of the wife's domicile, whether those courts were in England or elsewhere.<sup>37</sup>

(v) That a decree pronounced by the appropriate authority of the personal law of either party be recognised as effective to dissolve their marriage, whatever the attitude of the personal law of the other party.

(vi) That a decree pronounced on the basis of the personal law of the parties (or either of them) should be recognised as valid even though not made by the courts of the parties' personal law. This is merely an extension into the more important sphere of substantive law of the jurisdictional principle of *Avantage v. A.G.*,<sup>38</sup> in which English and most other British and American courts recognise the validity of a decree which is considered valid by the courts of the domicile of the parties, though in fact pronounced by the court of a third country. Both French and German law appear to attach more importance to the substantive law of divorce than to the question of exclusive jurisdiction in matters of personal law, and it is reasonable to maintain that the sovereignty of the personal law in domestic matters is well enough served by the application of that law even in a foreign court to justify recognition of the decree.<sup>39</sup> English courts apply only English internal law to the

grounds, procedure and remedies for divorce, whether the petition is based on domicile or residence.<sup>40</sup> It is suggested that, by the extension of the principle in *Avantage v. A.G.*,<sup>41</sup> English courts could recognise the validity of the decree of a foreign court based on the application of the parties' personal law.

37. This suggestion is less novel than it may seem. Precedent for it exists in both English and New York law, neither of which can be considered an unduly radical system. The English precedent may be found in the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, under which, it will be recalled, English courts recognise Indian and certain colonial decrees of divorce of British subjects resident in India or a colony to which the Act applies but domiciled in England or Scotland, provided that the grounds of divorce correspond to those of the parties' personal law. This jurisdiction has recently been extended to many other British territories.<sup>42</sup> Secondly, in the important case of *Gould v. Gould*,<sup>43</sup> New York courts recognised a French decree of divorce of parties domiciled in New York but resident in France, the French court applying New York law of the grounds for divorce because of the nationality of the parties.

38. While it is beyond the purpose of this paper to consider in detail English rules of divorce jurisdiction and substantive law, it may be observed that English law could achieve a greater consistency in ensuring the dominance of the personal law in matters of domestic status by applying that law rather than English internal law as *lex fori* to substantive issues when jurisdiction over the status is exercised on a basis other than that of domicile of the parties.<sup>44</sup> The adoption of this principle would be a complete innovation in the law of divorce, but it finds support from the Court of Appeal in the related branch of law on annulment of marriage,<sup>45</sup> and would in any event constitute an infinitely closer adherence to the idea of the supremacy of the personal law than appeared, for example, in *Zanelli v. Zanelli*.<sup>46</sup> But the introduction of the principle suggested would be merely a remedial corollary to the retention of the present illogical and exceptional jurisdiction in divorce on the basis of residence. If, as is proposed above, such a basis of jurisdiction became unnecessary through conformism on a married woman of capacity to acquire her own domicile, so that English divorce jurisdiction could without hardship be confined exclusively to a basis of domicile, her personal law would automatically be applied by the English courts, since it would also be English law, and the introduction of the principle stated in this paragraph would not be required, except in certain cases of the recognition of foreign decrees of divorce. But so long as residence remains a basis of divorce jurisdiction, the need remains in the interests of justice and consistency to apply the personal law of the parties to the substantive issues in the case.

39. If some of these proposals sound strange to the ears of an English lawyer, let him compare the spectacle of the limping marriage in its various forms, and bearing in mind the magnitude of the social problem of divorce and displaced populations, and the inadequacy and confusion of the present English law of recognition of foreign decrees, let him put forward other and better proposals of his own for solving the problem. Among members of a Society such as this the task should be easy.

<sup>35</sup> *Warriner v. Warriner* (1835), 2 Cl. & Fin. 488; *Zanelli v. Zanelli* (1948), 44 T.L.R. 556.

<sup>36</sup> Above.

<sup>37</sup> The Colonial and Other Territories (Divorce Jurisdiction) Act, 1959.

<sup>38</sup> 235 N.Y. 14 (1925).

<sup>39</sup> E.g., under Matrimonial Causes Act, 1950, s. 18.

<sup>40</sup> *De Rosset v. De Rosset*, (1948) P. 300; *Cosy v. Cosy*, (1948) P. 420.

<sup>41</sup> Above.

<sup>42</sup> Above.

## PAPER No. 127

### MEMORANDUM SUBMITTED BY DOCTOR G. C. CHESHIRE, D.C.L., F.B.A.

(Note.—Doctor Cheshire was subsequently co-opted to serve as a member of the Committee on Private International Law set up by the Convention.)

I. This memorandum is submitted in the hope that the Royal Commission may be persuaded to propose legislation designed to regulate the international validity of divorces. The present rules of private international law on this subject are defective in at least two respects:—

First, they exclude the jurisdiction of the English

court in many cases where it is appropriate that relief should be granted in England.

Secondly, their application too often results in divorced parties being regarded by one system of law as single persons, but by another as still married. This is a state of affairs that is distressing, not to the parties

along, but also to the children that either may have by a subsequent marriage, and it is one that should not be tolerated if a reasonable remedy can be found.

The causes of the unsatisfactory state of the present law are two:—

First, the basis of divorce jurisdiction varies in different countries. In some it is nationality, in others domicile, in others residence that falls short of domicile in the English sense.

Secondly, the particular legal system that must decide whether sufficient cause for divorce exists and whether in other respects a decree should be granted also varies in different countries. For instance, an English court always applies English internal law, whether the parties are English or foreign, but many other European courts adopt in the case of foreigners a cumulative system and apply both the internal law of the forum and the internal law of the country of nationality.

Thus, in considering the international validity of divorces, two problems fall to be considered, one relating to jurisdiction, the other to choice of law. These will be considered as follows:—

- (1) English decrees.
- (2) Effect in foreign countries of English decrees.
- (3) Effect in England of foreign decrees.

#### (1) English decrees

2. *Jurisdiction.* At common law an English court possesses no divorce jurisdiction unless both parties are domiciled in England at the time of the commencement of proceedings. There are two relevant facts to stress concerning this rule. First, the English conception of domicile is technical in the extreme and often out of touch with the realities of life. It is not always equivalent either to domicile as understood in non-British countries or to permanent home in the popular sense, and there are many cases in which parties have been denied a domicile in the country where they have lived for the greater part of their lives. Secondly, the domicile of both parties means in fact the domicile of the husband. According to English law a wife can never acquire a separate domicile of her own for divorce or any other purpose, not even if she has been judicially separated from her husband. This leads to the problem of the deserted English wife, for if the husband of an Englishwoman possesses or acquires a foreign domicile, his wife, if deserted and given cause for divorce, cannot at common law obtain relief from the courts of her own country.

3. This common law principle that the domicile of the husband affords the only basis of jurisdiction creates the first defect in practice, namely, residence in England by both parties, however long and continuous it may have been, never entitles either party to petition the court for relief if in the eyes of English law the husband is technically domiciled abroad. The principle has, indeed, been modified, but only in favour of the wife, by Section 18 (1) of the Matrimonial Causes Act, 1950, which is to the following effect:—

The court shall have jurisdiction to entertain divorce proceedings by a wife, notwithstanding that the husband is not domiciled in England,

(a) if the wife has been deserted by her husband, or the husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in England;

(b) if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.

4. The problem of the deserted wife, therefore, is satisfactorily settled, but there still remains a gap, since the court has no jurisdiction to grant divorce at the instance of the husband if both parties have long resided in England without having acquired a technical domicile there. It is submitted that so far as jurisdiction is concerned an obvious improvement would be effected by a new enactment granting jurisdiction to the High Court where both parties are resident in England and have been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, except where their domicile is in some other part of the

United Kingdom or in the Channel Islands or the Isle of Man. This would be justified on the ground of convenience and would have the additional advantage of avoiding the ascertainment of the place of domicile which is often one of the most difficult tasks that confronts a judge.

5. *Choice of law.* Such an enactment, however, would not be satisfactory unless it also dealt with the question of choice of law. It is one thing to put the English machinery in motion, but quite another to ignore the law of the foreign country to which the parties belong. The existing practice, by which English internal law is applied exclusively in a divorce suit, is reasonable, since the parties have attracted that law to themselves by establishing their permanent home in England, but it can scarcely be justified where jurisdiction is based on mere residence. It would obviously be improper, for instance, to apply English law exclusively in the case of parties who, though resident in England, were German by domicile and by nationality, and to grant them a divorce for a cause not recognised as sufficient by German law.

6. If a decree were granted in such circumstances, the parties would be single persons in the eyes of English law though still married according to German law. If, therefore, jurisdiction is to be allowed on a residential basis, it will be necessary, in accordance with the doctrine of cumulative law and with the spirit of the Hague Convention of 1902, to ensure that the substantive law of the country to which the parties belong by nationality or by domicile is not flouted. This could be done by some such enactment as the following:—

A decree of divorce shall not be granted on the basis of the residence in England of both parties unless divorce would also be obtainable in the particular case under the personal law of the husband.

7. This suggested draft requires elucidation in three respects.

(a) The term "personal law" means the law that determines questions of status, including the question of divorce. In many countries this is the national law, in others, including the British Empire and the U.S.A., the law of the domicile. Which of these two would represent the personal law in a given case for the purposes of the draft proposal would depend upon the national law of the husband. For instance, in the case of a Danish national it would be the law of the domicile, in the case of an Italian the law of his nationality.

(b) In some cases the parties to a marriage are nationals of different countries. It would be possible, therefore, to require both of these laws to be observed by the English court, but it is probably preferable not to look beyond the personal law of the husband.

(c) The condition prescribed by the draft is that divorce should "also be obtainable in the particular case" under the personal law. These words do not mean that the cause recognised by English law must necessarily be recognised by the personal law, but that in the particular circumstances of the case divorce would be obtainable under the personal law. For instance, an unsuccessful attempt to commit adultery is sufficient ground for divorce in France, but apparently desertion is not. Therefore an English court could grant a decree under the proposed draft in the case of French nationals upon proof that the husband had made such an unsuccessful attempt and had also deserted his wife for three years.

8. The words also import that any fact, such as condonation, which under either law would prevent divorce, would be fatal. Further, these suggested words would presumably dispel the existing doubt as to whether a divorce obtained by some extra-judicial method is recognised by English private international law. For instance, by Moslem and Jewish law, a husband may divorce his wife by making a formal and written communication to her, if an Israeli husband belonging to the Jewish faith were to petition for a divorce in England on the basis of an English residence, it would clearly be a case where divorce would "be obtainable" under his personal law.

9. By way of postscript to the present suggestion, that divorce jurisdiction should be allowed on a residential and cumulative basis, reference is made to the final report of the Committee on Procedure in Matrimonial Causes (Cmd. 7024 (1942) p. 31) which made the following recommendation:—

"When a husband and wife are resident in this country the High Court should have jurisdiction to grant a decree of divorce or nullity as if both parties were at the material time domiciled here provided that the law of

the place where the parties are domiciled recognises as sufficient cause for a decree of divorce or nullity the same cause as that for which it is sought here."

(2) **Effect in foreign countries of English decrees based upon domicile in England**

10. It has been suggested in the preceding section that any extension of the existing divorce jurisdiction should be made subject to the doctrine of cumulation, under which regard must be had to the foreign personal law as well as to English law. The question now arises whether the present jurisdiction of the High Court, founded though it is on domicile, should not also be subjected to the same doctrine when the parties to the suit are foreign nationals. The object, of course, would be to prevent divorced parties from having a different status in the two countries with which they are connected. The following is an illustration of how this only too familiar situation may arise. H., French by nationality but domiciled in England, marries W., an Englishwoman, and later obtains a divorce from the English court of the domicile on the ground of W's insanity. Will the decree be recognised as valid by French law? This again raises the two questions of jurisdiction and choice of law.

11. As to jurisdiction it is, of course, impossible to lay down a single principle that is accurate for all countries, but the majority of European States recognise the jurisdiction over their own nationals of the courts of the domicile. In the case suggested above, for instance, there is no jurisdictional impediment to the validity in France of the English decree. The difficulty arises, however, in connection with the choice of law, for the general rule again is that a foreign divorce will not be recognised as valid unless it has been obtained for a cause sufficient by the personal law. In the case put above, for instance, the English decree would be regarded as invalid by the law of France, since insanity is not a sufficient cause in that country. Thus, here is another type of case where the parties may be unmarried in England but married abroad. It might therefore be desirable to provide that:—

Where foreign nationals petition the High Court for divorce by reason of their domicile in England, no decree shall be granted unless in the particular case it would be obtainable under the national law of the husband.

(3) **Effect in England of foreign decrees**

12. The well-established rule of English law, to which there is only one exception,<sup>1</sup> is that a divorce granted in another country, whether British or not, must be treated as invalid, unless it has been obtained in the country of the husband's domicile or unless, if obtained elsewhere, it is regarded as valid by the law of that domicile. The unfortunate impact that this rule may have upon foreign divorcees may be illustrated by reference first to the U.S.A. and then to European countries.

13. *U.S.A.* It is recognised throughout the U.S.A. that a wife may acquire a domicile separate from that of her husband and may obtain a valid divorce in the separate domicile. Thus a type of case that frequently occurs in practice is the following. A man domiciled in England marries an American woman domiciled in, say, Connecticut. Later the parties separate, the woman resumes her former domicile and obtains a divorce in Connecticut. The parties, therefore, though unmarried persons according to the law of Connecticut and the sister States, are still regarded as husband and wife by English law, since in the English view the wife is still domiciled in England.

14. In a case of this type the wife is connected with the forum not only by the separate domicile that is ignored by English law, but also by residence, a fact that can scarcely be ignored now that by the Matrimonial Causes Act, 1930, § 18 (supra) a wife's mere residence in England confers divorce jurisdiction upon the High Court. Presumably, English courts no doubt expect that divorces granted under this Section will be regarded as valid in foreign countries, but if this is so reciprocity demands that foreign decrees based on an equivalent residence should be recognised in England. It is possible, of course, that the English courts may reach this conclusion, but the matter is doubtful and indeed a Scottish court has already refused to do so (*Warden*, 1931 S.L.T. (Notes of Recent Decisions) 28).

15. It is therefore suggested that legislation should be passed providing for the recognition by English courts of a foreign decree of divorce granted under a rule of

law substantially corresponding to the provisions of Section 18 (1) of the Matrimonial Causes Act, 1930, which deals with petitions by the wife alone.

16. This, however, will not conclude the matter if, as suggested above, the residence of both parties in England is made sufficient to found the jurisdiction of the High Court. If this becomes the law, reciprocity again demands that a similar indulgence should be conceded to foreign courts of the residence. It might be provided, for instance, that:—

A decree obtained in the country where both parties have been ordinarily resident for a period of three years immediately preceding the commencement of the proceedings shall be recognised as valid in England, provided that it would also have been obtainable in the particular case under the personal law of the husband.

17. This is analogous to the following recommendation of the Committee on Procedure in Matrimonial Causes:—

A decree of divorce or nullity granted to parties by a court of the country where they are resident for a cause recognised by the law of that country should be recognised as valid here provided that the cause for which the decree was granted is recognised by the law of the place where they were domiciled as sufficient cause for such a decree.

18. There is nothing revolutionary in the present proposal. The statutes mentioned in the footnote provide that the courts in any part of His Majesty's dominions, protectorates, trust territories and protected states (other than self-governing dominions) to which the statutory provisions are extended by Order in Council, shall have divorce jurisdiction over British subjects domiciled in England, Scotland, or Northern Ireland, provided that their last common residence was in the forum and that the petitioner is resident there at the time of presenting the petition. The grounds on which divorce may be granted are limited to those recognised by the existing law of England. A divorce so obtained may be registered in the country of the domicile of the parties, whereupon the effect is the same as if the decree had been granted in England, Scotland or Northern Ireland. The Acts have already been extended to Kenya, Jamaica, Hong Kong, Singapore and the Malayan Union.

19. *The continent of Europe.* The prevalent rule on the continent is that nationals, wherever domiciled, can obtain a decree of divorce from their national courts. This again, when set aside the rigid English rule that domicile alone founds jurisdiction, may imbue the parties with a dual status. For instance:—A Danish national marries an Englishwoman and acquires a domicile in England or in some country other than Denmark. He later obtains a divorce from the Danish court. Under existing English law the divorce is ineffective and the wife is still married to her husband. If there is cause for divorce by English law, the wife can no doubt obtain a decree in England by virtue of the common domicile, but it may well be that she will be remediless until she can prove desertion for three years. It is, therefore, submitted that a decree obtained in the country of which the husband is a national should be recognised in England, whether the cause for which it is granted is sufficient by English law or not. This suggestion is not new. As long ago as 1938 Professor Gutteridge proposed that "the concurrent jurisdiction of the courts of the nationality and the domicile should be recognised, not only in the strict sense of the word, as meaning competence to adjudicate, but, in an effective sense, as power to adjudicate in accordance with the *lex fori*!" (19 B.Y.I.L. p. 38). Such a change would represent a concession to the principle of nationality, now adopted by about half the world's population, but it would find its justification in relieving many divorcees from a distressing situation.

20. In some continental countries (e.g., Belgium, Sweden and Holland) divorce jurisdiction is exercised on the ground of residence falling short of domicile in the English sense. A foreign divorce granted on this basis would, however, be effective in England if the proposal made above were adopted that the recognition of residential decrees should be made dependent upon the personal law of the husband being satisfied.

21. In conclusion it may be useful to summarise the alterations in the law suggested in the present memorandum.

**I. Jurisdiction of the English Court**

(1) High Court to have jurisdiction if both parties are resident in England and have been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, but no decree to be granted on this basis unless it would also

<sup>1</sup> Indian and Colonial Divorce Jurisdiction Acts, 1925 and 1940, as amended by the Colonial and Other Territories (Divorce Jurisdiction) Act, 1955.

be obtainable in the particular case under the personal law of the husband.

(This would be additional to the cases where, under the Matrimonial Causes Act, 1950, § 18 (1), the residence of the wife alone is sufficient.)

(2) No decree to be granted to foreign nationals domiciled in England unless in the particular case it would be obtainable under the national law of the husband.

## II. Recognition of foreign decrees

(1) Decree obtained in the foreign country where both parties have been ordinarily resident for a period of three years immediately preceding the commencement of the proceedings to be recognised, if it would also have been obtainable in the particular case under the personal law of the husband.

(2) Foreign divorces granted at the instance of the wife in the same circumstances as those provided for by the Matrimonial Causes Act, 1950, § 18 (1), to be recognised in England.

(3) A decree obtained in the country of which the husband is a national to be recognised in England, whether the cause for which it is granted is sufficient by English law or not.

22. The general theme of this memorandum is that it matters little where the machinery of divorce proceedings is put in motion, provided that reasonable consideration is given to the personal law of the parties. To allow parties domiciled in England to be divorced in Florida, where they have resided together for ten years, is scarcely objectionable. What is objectionable is that they should be divorced on the basis of residence for a reason wholly inadequate in the eyes of English law.

(Dated 20th December, 1951.)

## PAPER No. 128

### MEMORANDUM SUBMITTED BY THE SECRETARY OF STATE FOR THE COLONIES

This memorandum recommends that the law should be amended so that in any case where the English courts have jurisdiction in matters of divorce and nullity, they will recognise the jurisdiction of colonial courts in similar circumstances.

(Note.—For simplicity, the memorandum refers only to "Colonies" but it is intended to apply equally to Protectorates, Trust Territories and other territories dealt with in the Colonial Office.)

1. The Secretary of State for the Colonies wishes to make the above recommendation to the Royal Commission in order to remedy certain difficulties arising out of the provisions of Section 13 of the Matrimonial Causes Act, 1937, and Section 1 of the Law Reform (Miscellaneous Provisions) Act, 1949 (now Section 18 of the Matrimonial Causes Act, 1950). These Sections have extended the jurisdiction of the English courts in proceedings for divorce and nullity of marriage by a wife where the matrimonial domicile is not in England, but there is no corresponding provision in either Act for the recognition of foreign or colonial decrees of a similar nature. The law in most of the Colonies, and other overseas territories for which the Colonial Office is responsible, regarding proceedings for divorce and nullity is based on English law, subject to any local statute. In many territories the provisions of the Matrimonial Causes Act, 1937 (including Section 13) have been enacted and, in some, legislation following Section 1 of the Law Reform (Miscellaneous Provisions) Act, 1949, has been passed. In following the law of this country, Colonies are adopting a course which is, *prima facie*, logical and justifiable, but, in the absence of any provision for giving effect here to a decree of divorce or nullity given by a colonial court to a wife whose husband is domiciled elsewhere than in the Colony, the Secretary of State feels doubtful how far it is desirable for a colonial legislature to enact laws altering the common law rules. If, for example, legislation is passed in a small Colony giving the local courts divorce jurisdiction based on residence, the courts in this country and elsewhere in the Commonwealth and all other courts which follow the common law rule basing jurisdiction on domicile, would presumably not recognise the validity of the decree granted by virtue of that legislation. It may be that the decree would, therefore, have little effect outside the Colony itself, which might be only a few square miles in extent.

2. The Secretary of State suggests that if the provisions of Section 13 of the 1937 Act and Sections 1 and 2 of the 1949 Act are to be perpetuated or if other alterations of the present law of this country are made, provisions should be made for the recognition of decrees granted under corresponding colonial laws, in order to ease the difficult problems of status that otherwise arise. Attention is invited to paragraph 83 (b) of the Final Report of the Committee on Procedure in Matrimonial Causes, 1947, in which attention was drawn to the desirability of including such a provision in a statute which extends the jurisdiction of the courts; and to Section 4 of the Matrimonial Causes (War Marriages) Act, 1944, which made provision, in connection

with the temporary extension of the court's jurisdiction under Section 1 of that Act, for recognition of the validity of colonial decrees made under any law declared by Order in Council to be a law substantially corresponding to the provisions of the Act.

3. An amendment having the effect suggested at the head of this memorandum would cover all extensions of the court's jurisdiction, present and future, and it would, it is submitted, be both logical and simple to apply. It would have effect automatically and the Order-in-Council procedure adopted in the Act of 1944 would not be necessary. To ascertain whether a decree should be recognised, the court would have to do no more than find the relevant facts and decide whether, in similar circumstances, the court would itself have had jurisdiction.

4. Fast as decrees granted under a colonial law giving the local courts jurisdiction when the parties are not domiciled in the Colony concerned are unlikely to be recognised in this country, so also it is probable that colonial courts would find it necessary to withhold recognition of United Kingdom decrees granted under the Acts of Parliament referred to in the first paragraph of this memorandum. It is, however, a reasonable assumption that, if legislation of the kind suggested above is passed here, many colonial legislatures would follow suit.

5. It has been represented to the Secretary of State that the problem of jurisdiction in divorce and nullity would be simplified by the adoption of the suggestion that has from time to time been made, that the wife should be enabled to acquire a separate domicile from that of her husband; that the old principle of the unity of the husband and wife has largely been abolished, and this is one of the few branches of the law in which it still remains. While appreciating the force of this contention, the Secretary of State feels that the question is not one upon which he should express an opinion. He would, however, observe that a reform on these lines would not obviate the necessity for legislation on the subject of mutual recognition of decrees.

6. The Secretary of State has been informed by the Secretary of State for Foreign Affairs and the Secretary of State for Commonwealth Relations that they agree in principle with the contents of the memorandum and recommend that any provision on the lines suggested should extend to foreign countries and other independent Commonwealth countries. In short, the enactment providing for recognition of decrees would extend to all other courts throughout the world.

(Dated 20th December, 1951.)

## PAPER No. 129

SUPPLEMENTARY MEMORANDUM SUBMITTED BY  
THE SECRETARY OF STATE FOR THE COLONIES

1. If the recommendation in the memorandum submitted by the Secretary of State on the 20th December, 1951, is accepted, the following consequential question arises: The English law would lay down, in effect, that the jurisdiction of a colonial court should be recognised if it is based on principles similar to those on which the English court exercises jurisdiction. If, however, the English law is amended between the date of the colonial decree and the date of the English judgment, should the English court, in comparing the jurisdiction of the colonial court with that of the English court, have regard to the old English law (in force at the date of the colonial decree) or the new law (in force at the date of the English judgment)? It can, perhaps, be assumed that the new law would be more liberal than the old law; and on this assumption the question would arise only if, before the amendment of the English law, it was less liberal than the law in force in the Colony.

2. It may be argued that the earlier law should supply the test. Otherwise the question whether the decree is regarded as valid in England would be a matter of chance, depending upon whether the question came before the English court before or after the amendment of the English law; and if the court has regard to the amending Act of Parliament, the Act would have retrospective operation as regards the colonial decree.

3. On the other hand, it may be contended that if reciprocity, though not a condition precedent to the recognition of colonial decrees, is to be hoped for and encour-

aged (see paragraph 4 of the memorandum), the English court ought to apply the law as it stands at the date upon which the matter comes before it. The advisability of adopting this view may be demonstrated by referring to an aspect of the problem which may be of practical importance in the near future. As stated in the memorandum, legislation on the lines of Section 13 of the Matrimonial Causes Act, 1937, and Section 1 of the Law Reform (Miscellaneous Provisions) Act, 1949, has already been enacted in a number of Colonies; and if the law of this country is amended in the manner suggested in the memorandum, there is little doubt that many Colonies will follow suit. In that event, it appears to be desirable that the colonial law regarding recognition of decrees obtained in this country under those Sections should extend to decrees granted at any time since those Sections were enacted. Since, if past practice is taken as a guide, colonial laws are more likely to follow existing English Acts in regard to jurisdiction in matrimonial causes than to confer jurisdiction upon the local courts in circumstances which do not give jurisdiction in England, this aspect of the question (retrospective recognition of English decrees by the courts of other countries) appears to be of greater significance than the reverse, so far as Colonies are concerned. This is not, however, the case as respects independent Commonwealth countries and foreign countries.

4. The Secretary of State for Foreign Affairs and the Secretary of State for Commonwealth Relations agree with the contents of this supplementary memorandum.

(Dated 18th April, 1952.)

## PAPER No. 130

MEMORANDUM SUBMITTED BY MR. WILLIAM LATEY, M.B.E., Q.C.,  
ON BEHALF OF THE INTERNATIONAL LAW ASSOCIATION

## Recommendations

1. It is recommended that such changes in the laws of England and Scotland be made as may be necessary to give effect to the following project for the mutual recognition and registration of final judgments of divorce *a vinculo* and nullity of marriage by the English and Scottish courts and by foreign courts, subject to the ratification of agreements for that purpose between His Majesty's Government and other contracting States.

"Any decree of divorce *a vinculo* or of nullity of marriage pronounced by a competent court or authority in a contracting State shall, at the request of either husband or wife (the parties in the cause) be recorded by the competent court of the other contracting State, and have the force of law in the latter State, subject to the following conditions:—

(a) Such judgment or decree pronounced by the original court shall be final, and the time for appeal, if there be any right of appeal, shall have expired.

(b) The judgment or decree shall have been pronounced by a competent court of the State

(i) in which either the husband or the wife was domiciled at the time when the suit was instituted; or

(ii) in which either party has been actually resident for an aggregate period of one year during the eighteen months immediately preceding the institution of the suit; or

(iii) of which, according to the *lex fori*, either party was a national at the time when the suit was instituted:

Provided that in the case of a decree of nullity founded on an informality invalidating the marriage ceremony according to the *lex loci celebrationis* or on an incapacity under that law to contract a valid marriage, none of the foregoing stipulations in this sub-clause need be fulfilled if the decree is pronounced by a court of the State where the marriage was celebrated.

(c) For the purpose of any such Convention between State and State "domicil" shall mean either the domicile of origin: or if it has been abandoned the domicile

of choice, namely, the place where the party in question actually resides with the intention of residing there permanently. Where the *lex fori* of the recording court so requires, but not otherwise, the domicile of a married woman shall be the same as, and change with, that of her husband.

(d) The respondent to the suit must have been personally served with or acknowledged that he had notice of the proceedings at the institution of the suit.

(e) A "competent court" must be one that has jurisdiction to pronounce a decree according to the *lex fori*, and must be a court specified in any Convention between contracting States as having jurisdiction and competence.

(f) Six months must have elapsed since the date of the original decree and the time for any appeal must have expired before the decree is recorded in the court of the other State."

## Introductory

2. No figures are available to show how many judgments or decrees of divorce in the many countries in which the Christian law of marriage purports to be maintained leave unbroken the bond of marriage according to the law governing the status of one or other of the spouses so that a man or a woman may be divorced according to the law of one State but remain married according to the law of another State. Only those lawyers whose business it is to study or deal with actual cases arising out of this conflict of laws can offer useful opinions on the dimensions of the problem, but the International Law Association has been busy from the beginning of this century agitating for a reform on abundant evidence from a number of countries. In almost every country where judicial divorce is allowed there are so many reported cases as to create the certainty that the problem is grave and weighty and, in view of the enormous spread of divorce in recent years, is not likely to decrease.

3. It is a subject which has engaged the anxious attention of some of the leading jurists of today, not least of Dr. Cheshire, formerly the Vinerian Professor of Law at Oxford. No one has painted the sorry picture in clearer colours than he in his article in the *Law Quarterly Review*

(1945), Vol. 61 at page 352, when he cited with approval the well-known dictum of Lord Westbury in *Shaw v. Gould* (1868) L.R. 3 H.L. 5583: "Marriage is the very foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and conditions of forming and, if necessary, of dissolving the marriage contract". Dr. Cheshire continued: "If this is true, and it seems to be more true now when so many of the other props of civilisation have been weakened, it follows that any legal doctrine which may operate to render uncertain the status of divorced persons, and which may, therefore, prejudice the stability of a later marriage by other party, is a social evil that calls for the intervention of the law reformer. . . . Though divorce is unavoidable we can at least do our best to ensure that there is no inequality in the status of the members of the family after decree absolute". Further, he illustrated the point that this problem has been long with us by referring to Sir Robert Phillimore's declaration in 1861 deploring the "great and lamentable discord, both in the opinion of the jurists and the decisions of the Courts" on the vital question whether a dissolution of marriage in one state was valid in another. In conclusion, the remedy he suggested was that English law should allow residence as an alternative to domicile to found jurisdiction providing that the law of the domicile be applied. He put it thus: "A decree of divorce granted to parties by a Court of the country where they are resident shall be recognised as valid in England, provided that the cause for which the decree was granted is sufficient by the personal law, and provided that both parties were personally subject to the jurisdiction of the Court".

4. In the final report of the Committee on Procedure in Matrimonial Causes, presented over by Mr. (now Lord) Justice Denning (1947, Cmd. 7024) recommendations were made based on Dr. Cheshire's reasoning as follows:—

"(i) When a wife has been deserted by her husband and she was, immediately before the marriage or immediately before the desertion, domiciled in this country, the High Court should have jurisdiction in and in relation to proceedings for divorce as if both parties were at the material times domiciled here."

(Subsequent legislation in England, as will be seen in paragraph 13 post, has gone further than this proposal in extending the jurisdiction in favour of wife suitors.)

"(ii) The validity of any decree made in any part of His Majesty's Dominions or other prescribed country under a law substantially corresponding to the foregoing provisions should be recognised in our Courts."

(iii) When a husband and wife are resident in this country the High Court should have jurisdiction to grant a decree of divorce or nullity or if both parties were at the material time domiciled here provided that the law of the place where the parties are domiciled recognises as sufficient cause for a decree of divorce or nullity the same cause as that for which it is sought here."

(iv) A decree of divorce or nullity granted to parties by a Court of the country where they are resident for a cause recognised by the law of that country should be recognised as valid here provided that the cause for which the decree was granted is recognised by the law of the place where they were domiciled as sufficient cause for such a decree."

5. The second of these recommendations is in substance contained in the International Law Association project, but the third and fourth recommendations would appear to bring into the limelight those differences in the causes of divorce in various countries which the authors found an awkward obstacle to the achievement of their purpose, as explained in paragraph 19 post. It was indeed deemed an impossible task at one stroke to bring about uniformity (a) in the causes of divorce throughout the civilised countries or (b) the quality or administrative methods of the courts exercising the jurisdiction.

6. The above considerations were fully considered before the draft Convention (reproduced in substance by the recommendations now laid before the Royal Commission) was adopted by the International Law Association at its conference at Prague in 1947 (the year before the iron curtain descended on Czechoslovakia). The project was first formulated in concrete form at the Association's conference in Oxford in 1932, as the result of the report of a committee of lawyers well versed in the laws of divorce and nullity of which the late Mr. R. F. Balfour,

K.C., was chairman, the late Mr. J. Arthur Barratt, K.C., vice-chairman, and Mr. William Lacey the convenor.

7. The Oxford project also included a proposal that the judgment of a competent court of the country in which the marriage was celebrated should also be deemed fit for mutual recognition, but on reconsideration at the Cambridge conference of the Association in 1946 this proposal was modified in the proviso to Article 2 (b). It was thought that it would open the door too wide to abuse if jurisdiction was to be exercised without some limitations by a court merely because a marriage was celebrated in the country where such court functioned, there being many kinds of passage and rapid methods of transport nowadays. Nevertheless, when one looks at the proposed conditions of jurisdiction, i.e., domicile or nationality or residence, it is obvious that under one head or the other the original decree would in most cases be made by the court of the country in which the parties were married.

8. At the Cambridge conference Dr. Cheshire again urged the importance of applying the proper law wherever the remedy was given. He said that jurisdiction in divorce should exist in the country of the domicile, nationality or residence of either party. He suggested that in divorce the choice of law should be (a) the *lex fori* (*lex fori* means the law of the country where the court in question is exercising its functions) if the court to which the parties resorted was either in the country of the domicile or the country of their nationality; (b) or where residence founded jurisdiction a divorce should be granted only for a cause valid according to both the *lex fori* and the personal law of the parties.

9. The committee of the International Law Association dealing with this matter (of which Mr. William Lacey was the Chairman) advised after the Cambridge conference against complicating its project by laying down a further condition regulating the choice of law. The project would leave each country free to determine for itself which of its courts should have jurisdiction in divorce and the *lex fori*. Power would be taken by each contracting State to record the decrees of approved courts of other countries if those decrees complied with the fundamental conditions set out in the draft Convention. Thus in 1947 at Prague the draft Convention assumed its final form.

#### Jurisdiction in divorce in England and abroad

10. As regards divorce, the jurisdiction in the English and Scottish courts depends solely on the English or Scottish domicile of the husband at the time of the institution of the suit. Subject to wide-reaching statutory modifications in recent years, this has been the law since it was definitely laid down by the Judicial Committee of the Privy Council in *Le Manoir v. Le Manoir*, (1895) A.C.517. But the statutory changes have gone far to lessen the rigidity of this sole basis of jurisdiction.

11. The Matrimonial Causes Act, 1937, (Sir Alan Herbert's Act) removed some element of hardship in the case of English wives (a) deserted by their husbands who thereupon acquired foreign domicile and (b) deprived of their remedies in divorce in England by their husbands being deported; in either case instead of having to proceed in the court of the husband's new domicile she could resort to the English court if the husband was domiciled in England at the time of the desertion or deportation. Even this concession failed to cover many hard cases, as sometimes the desertion could not be proved to have taken place until after the husband had acquired his new domicile abroad.

12. The anomalous position of a wife was rendered more acute owing to the marriages during the recent world war of so many Englishwomen to members of the Commonwealth or Allied forces stationed in England, men who never were domiciled in England. This led to the passage of the Matrimonial Causes (War Marriages) Act, 1944, rendering it possible, subject to certain safeguards, for the English wives of such men to have recourse to the divorce court notwithstanding that their husbands were domiciled abroad. But this concession only applied to marriages between September, 1939, and June, 1950.

13. Lastly, by a provision in the Law Reform (Miscellaneous Provisions) Act, 1949, a drastic change was made in the basis of jurisdiction in divorce on behalf of wives who had grounds for dissolution of marriage but whose husbands were domiciled abroad. Such wives may now sue for divorce in England if they have been ordinarily resident in England for a period of three years immediately preceding the commencement of the proceedings.

This is now contained in Section 18 of the Matrimonial Causes Act, 1950. It is notable that there was imported into this Section (sub-section 3) a somewhat unusual statutory provision, namely, that in the exercise of this special form of jurisdiction, "the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings".

14. Thus, wives in England are in much the same position with regard to jurisdiction as are wives in New Zealand, Canada, and in most of the States of the United States (where for purposes of divorce wives are allowed to acquire a domicile separate from that of their husbands). In most of the Continental countries the basis of jurisdiction is the principal place of residence of the tutor: if a wife has made her home in a certain town for a considerable period she may sue in the District Court for divorce, though her husband is domiciled abroad in the English sense of domicile. But in some of the Continental countries the rule is that only the court of the husband's nationality is competent to dissolve a marriage. Foreign lawyers have frequently commented on the rigid test of the husband's domicile as the only basis of divorce jurisdiction in English law being not in consonance with the comity of private international law: and since the sweeping change made by the Act of 1949 (referred to above) the principle laid down in *Le Maurier v. Le Maurier* seems to have largely gone by the board in this country.

15. It is submitted that this change of basis of jurisdiction contained in Section 18 of the Act of 1950, affecting wives only and still maintaining the rigid test of a husband's domicile for husbands, weakens the case for refusing to recognise foreign decrees based on jurisdiction arising from residence only.

16. Apart from England, Scotland and Northern Ireland the basis of jurisdiction abroad varies according to the particular country and even more according to judicial practice which has departed in some countries from the strict letter of the law. In English and Scottish law the domicile of a person is the country which is in fact his permanent home or is so deemed by operation of law, and it is not necessarily determined by his nationality. It is the country in which a person is resident with the intention of remaining there. The intention must be (as laid down by the late Mr. Justice Langton in *Gulbenkian v. Gulbenkian*, (1937) 153 L.T. 46, at page 50) a present intention to reside permanently, but it does not mean that such intention must necessarily be irrevocable: it must be an intention unlimited in period but not irrevocable in character.

17. On the continent of Europe, however, domicile for the purpose of divorce proceedings has come to mean in general practice the principal place of residence. Thus in France the competent courts entertain divorce suits by foreigners if they have become resident in that country and purport to have abandoned the domicile of their native countries, and there is no protest by the defending party against the jurisdiction; but if there is such a protest the court may refuse to exercise jurisdiction if satisfied that the national court of the defender is the proper forum. Nevertheless the French courts are under a duty to examine the national law of either party, usually the husband's national law, to make sure that under the national law divorce is allowed, albeit on different grounds. Thus a French court would not dissolve the marriage of an Italian national suing for divorce, because his national law forbids divorce *a vinculo*. But, however inconsistent it may seem, the French courts will grant a divorce to a French woman married to an Italian if she has retained or recovered her French nationality, (see *Ferrari case*, 57 *Clunet* (1922) 714). In general, but subject to even greater use of jurisdiction and of application of the *lex fori* in some countries, this is the practice in most Continental countries.

18. In a few of the Continental countries jurisdiction is based on nationality. Thus in Hungary the courts did not, at any rate up to 1945, exercise jurisdiction in divorce on behalf of foreigners except, to quote article 116 of the Marriage Act XXXI of 1894, in cases where the decree would be held valid in the State of the parties' allegiance (i.e., nationality). Moreover the Hungarian courts had exclusive jurisdiction in divorce over Hungarian nationals, wherever they might be living or even if they had abandoned their domicile of origin. In Czechoslovakia, before the iron curtain fell, the courts exercised jurisdiction in

divorce in cases of foreigners either resident or domiciled in that country, provided that husband and wife had their last common home in that country. In Western Germany more or less permanent residence by a foreigner in that country founds jurisdiction, unless his national law has exclusive jurisdiction.

19. It is not proposed in this memorandum to weary the Royal Commission with an exhaustive review of the basis of jurisdiction in divorce in foreign countries, or of the numerous and diverse grounds of divorce prevailing therein, and an examination of the diverse laws of the States of the United States of America seems to be equally out of place. Enough has been said perhaps to explain why after prolonged consideration of the many differences in the grounds of divorce and the bases of jurisdiction in the diverse legal systems, those who prepared the project approved by the International Law Association in 1947 came to the conclusion that the only practical method of reducing widespread anomalies lay in the mutual recognition by State A and State B (the contracting States) of their respective bases of jurisdiction, subject to adequate safeguards.

20. In the British system alternative jurisdiction under certain conditions had already been set up in the form of the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, whereby subject to certain conditions, a High Court in India or specified British Colonies could dissolve a marriage on a petition for divorce if the parties are British subjects domiciled in England and Scotland in any case where the court would have had jurisdiction if the parties had been domiciled in India or the particular Colony. Decrees made in such circumstances could be registered at the Principal Divorce Registry in London, and as from the date of registration such decrees had the same force and effect as if they had been pronounced in England or Scotland as the case may be. Since India became independent this Act has ceased to operate in its component parts as in Ceylon and Burma, but the statute has been developed by the Colonial and Other Territories (Divorce Jurisdiction) Act, 1950, and may in due course be applied to every considerable British Colony possessing High Court jurisdiction in divorce. Thus we have the proposed machinery of registration already in existence.

21. Some reference should be made to the Hague Convention of June, 1902, which was an attempt to adjust some of the anomalies heretofore mentioned. Various European countries adhered to it for a time, but most of them had formally withdrawn from it before the second world war, and it is now virtually a dead letter. Its practice its invocation both of the law of the nationality and of the *lex fori* was not workable.

#### Jurisdiction in nullity

22. The project of the International Law Association covers jurisdiction in suits for nullity of marriage as well as for divorce, but judgments for nullity are generally recognised between State and State in accordance with international comity. The procedure the Christian world over was uniform for centuries, with well-recognised grounds for annulment of marriage, and administered by ecclesiastical courts well versed in the law. When however the jurisdiction in nullity was transferred to the secular courts in England and other countries in the nineteenth century and canonical grounds of nullity were either cut down or extended in various countries, questions of jurisdiction and mutual recognition tended to become confused.

23. Nevertheless in general the principle governing the English courts in cases where a foreign judgment of nullity has been made which was laid down by Lord Stowell in *Shelton v. Shelton* (1798) 1 Hag. Con. 294 as page 297 still seems to prevail. He said: "The validity of marriage, however, must depend in a great degree, on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnized, would carry with it great authority in this country; but I am not prepared to say, that a judgment of a third country, on the validity of a marriage, not within its territories, nor had between subjects of that country, would be universally binding".

24. In recent years the jurisdiction in nullity in England though by statute the same as in the old ecclesiastical courts, has become somewhat obscured by judicial decisions drawing a distinction between marriages which are void *ab initio* for some cause such as bigamy or consanguinity and those that are voidable only on the petition of one of the putative spouses, for some cause such

as impotence. In the latter event the Court of Appeal has held that an English wife takes the domicile of her husband, and that the marriage is still in being until and unless annulled by the court of her husband's domicile (*De Reneville v. De Reneville*, [1948] P.100). This decision would have applied even if the marriage had taken place in England, and raised a complication with regard to jurisdiction which however was remedied by Sections 1 (3) (b) and (4) of the Law Reform (Miscellaneous Provisions) Act, 1949, now contained in Section 18 of the Matrimonial Causes Act, 1950. This provision allows a wife, whatever her nationality or domicile, to present a petition for nullity in England if she has been ordinarily resident there for a period of three years immediately preceding the petition, providing that her husband is not domiciled in any part of the United Kingdom; and on such petition the English law of nullity is applied.

25. In an instructive address to the Grosvenor Society in 1946, Dr. Cheshire dealt in detail with the anomalous position with regard to the mutual recognition of decrees of nullity in England and foreign countries, but it is submitted that, in nullity as in divorce, the project of the International Law Association will overcome these anomalies in respect of those countries which agree to adopt it as between themselves. If a decree of nullity is pronounced by the competent court of the country, when at the time that the suit is instituted (i) either the husband or wife is domiciled there; or (ii) either party has been actually resident there for an aggregate period of one year during the eighteen months immediately preceding the institution of the suit; or (iii) either party was a national of that country; or (iv) in the case of a decree of nullity for infirmity or incapacity to contract a marriage according to the law of the country where the marriage is celebrated if such decree is pronounced by the competent court of the place where the marriage took place, the decree will be recorded by the court of the other contracting State.

#### Points of project explained

26. The text of the proposed draft Convention of 1947 is set out in the Appendix below.

Article 2 (c) defines domicile of origin and choice in accordance with the accepted meanings in English law, as laid down by Dicey and other leading English jurists.

"Where the *lex fori* of the Recording Court so requires, but not otherwise, the domicile of a married woman shall be the same as, and change with, that of her husband."

This condition may be illustrated as follows:—

(i) A New Zealand wife who has been deserted divorces her husband, e.g., on the ground of adultery, in New Zealand though at the time of the petition he has acquired a domicile of choice in England. An application is made to the English court to register the decree. The court would have no power to register the decree if the sole basis of the jurisdiction of the Court which made the decree was domicile because in English law the wife has become domiciled in England, and the New Zealand Court would be held in English law not to have jurisdiction. But if one examines the New Zealand Divorce and Matrimonial Causes Act, 1930, developing an older statute to a similar effect, one finds that the basic condition of jurisdiction is residence by the wife for not less than three years in that Dominion. Therefore the recording court in England would probably be able to register the decree under Article 2 (b) (2) of the draft Convention invoking the residential qualification notwithstanding the New Zealand provision that in such circumstances "she shall be deemed to be domiciled in New Zealand".

(ii) An Englishwoman marries a Czech and lives with him for some years in Czechoslovakia. The marriage proves a failure. On the wife's application the Czech court dissolves the marriage, but some months before the suit is commenced the husband has fled to the United States and become domiciled in one of the States. The wife escapes to England, and applies for the Czech judgment to be recorded. The English court would record the judgment under either conditions (b) (2) (residence) or (b) (3) (nationality) of Article 2.

27. It may be suggested that if an English wife is allowed to retain, or acquire a domicile separate from her

husband for the purposes of divorce most of the difficulties would vanish, by bringing into play a concurrent jurisdiction. Such a simple solution would indeed be welcome if it were to have that effect but unhappily, owing to the conflict of laws in most cases one or other of the spouses would still remain married according to the laws of another country. Take the following examples:—

(i) An Englishwoman had married a Hungarian or Italian and, claiming her separate domicile, obtained a divorce in England. This would be effective in England for her, but neither she nor her husband would be divorced in Hungary or Italy, as the case may be, because the laws of neither country would recognise the divorce; and other legal complications might arise over property and successional rights.

(ii) An American citizen in England, domiciled in a State of the United States of America marries after June, 1930 an Englishwoman in England. He deserts her, but in the State of his domicile, after due notice to his wife, divorces her on some ground of "mental cruelty" which would not justify a divorce in England. As he is domiciled in the American State, the English court would have difficulty in not recognising it. As the law stands in England the could divorce him here if he had been guilty of adultery or cruelty, but probably he would have got in first. To give her a separate domicile for the purpose of instituting divorce proceedings in England would in no way improve her position.

(iii) An Englishman domiciled in England marries in England an Englishwoman. She commits adultery, but he prefers not to sue for divorce. Invoking her separate domicile she goes and settles in a country where divorce may be obtained on flimsy grounds, and obtains a divorce, after due notice to her husband. Under the proposed "separate domicile" of the wife the English court would have to recognise the foreign decree and the aggrieved husband would be helpless.

Such illustrations could be multiplied, without the proposed "separate domicile" yielding any advantage to the innocent English wife over and above the present facilities for divorce afforded by Section 18 of the Matrimonial Causes Act, 1950.

28. Returning to the draft Convention, the authors attached great importance to that part of Article 2 (c) which provided that the original competent court of jurisdiction should be one "specified in the schedule to the Convention as having jurisdiction in the state in question and was a Court expressly recognised in the Convention as competent". As was said by the Chairman of the committee who introduced the project at Prague, "certain safeguards have to be introduced. We must do nothing to encourage the creation of Courts like that at Reno, Nevada, and before the late war in Latvia, which made a business of easy divorce. Our safeguards will be (i) not to agree to a Convention with any such State, and (ii) to schedule only those Courts which show a proper sense of responsibility".

29. It is acknowledged that there may be considerable difficulty in the selection of States and courts to ensure these safeguards. There are some States whose divorce laws are so loose that this country could not be expected to enter into this or any Convention with them. There are others in which this important jurisdiction is entrusted to inferior courts of a sort far below the High Court status insisted upon in England, despite the existing delegation of this duty to *ad hoc* commissioners as a temporary measure to meet the emergency caused by the late war.

30. It is submitted, however, that a beginning could be made by applying the Convention either in its present or a modified form to the British Dominions, where the system of divorce is more or less the same, by mutual agreement. Then it would be possible to approach such foreign States as conform, as nearly as possible, by way of due regard to the fundamental importance of preserving the institution of marriage and by careful administration to the English system. It might well be that if two or three bilateral conventions of this kind had successful results in removing the hardships, anomalies and inconsistencies indicated in this memorandum, other countries would be anxious to fall into line, even tightening up their divorce laws where too loose, and improving the administration thereof by a more careful choice of tribunals.

(Dated 7th January, 1952.)

## APPENDIX

Extract from Report of the Forty Second Conference of the Association—Prague, 1947

## Draft Convention as suggested by the Committee

## ARTICLE I

Each of the Contracting Parties undertakes to ensure by legislation in its own state that any decree of divorce a vinculo and any decree of nullity pronounced by a competent Court in the state of any one of the other High Contracting Parties shall, at the request of either husband or wife, and provided the conditions hereafter set forth are complied with, be recorded by a competent Court of its own state, which Court shall thereupon issue under its seal a declaration that such decree has been pronounced in compliance with the said conditions and such declaration so issued shall be as valid and effectual in the state of the recording Court as if the decree declared had been pronounced by that Court itself.

## ARTICLE 2

The conditions referred to in Article 1 are:—

(a) That the decree is a final decree from which there is no right or no further right of appeal.

(b) That the decree shall have been pronounced by a competent Court of the country (1) in which either the husband or wife was domiciled at the time the suit was instituted, or (2) in which either party has been actually resident for an aggregate period of one year during the eighteen months immediately preceding the institution of the suit, or (3) of which, according to the *lex fori*, either party was a national at the time that the suit was instituted; provided that in the case of a decree of nullity founded on an informality invalidating the

marriage ceremony according to the *lex celebrantis* or on an incapacity under that law to contract a valid marriage, none of the foregoing stipulations in this sub-clause need be fulfilled if the decree is pronounced by a Court of the country of the *lex celebrantis*.

(c) That for the purpose of this Convention "domicil" shall be the domicile of origin, or (if the latter has been abandoned) the domicile of choice. The domicile of origin shall be (1) in the case of a child born legitimate and born during his father's lifetime, the domicile of the father at the date of the child's birth, or (2) in the case of a child born posthumously or born illegitimate the domicile of the mother at the date of the child's birth or (3) in the case of a foundling the country where the child was born or found. The domicile of choice shall be the place where the party in question actually resides with the intention of residing there permanently. Where the *lex fori* of the Recording Court so requires, but not otherwise, the domicile of a married woman shall be the same as, and change with, that of her husband.

(d) That the respondent to the suit was personally served with or acknowledged that he had had notice of the proceedings at the institution of the suit.

(e) That the Court was a competent Court in the sense that it had jurisdiction according to the *lex fori* of the Recording Court to pronounce the decree and was a Court specified in the schedule to the Convention as having jurisdiction in the state in question and was a Court expressly recognised in the Convention as competent by the State of the recording Court. \*

(f) That six months (or such lesser period as the law of the state of the recording Court shall require) shall have elapsed since the date of the decree provided always that it shall not have been alleged, or, if alleged, proved to the satisfaction of the recording Court that the decree was procured by fraud.

## PAPER No. 131

SUPPLEMENTAL MEMORANDUM SUBMITTED BY  
MR. WILLIAM LATEY, M.B.E., Q.C.

1. Problems of jurisdiction in divorce and nullity in Great Britain come under two heads: (1) where people resort to the English or Scottish courts for relief under either category; (2) where questions arise as to the recognition or not of a foreign decree of divorce or nullity. In practice the problems are often interlocked.

2. Under the first head it has been suggested that one divorce (and apparently nullity and any other sort of matrimonial cause) a wife may acquire a domicile separate from her husband limited to take proceedings here, that otherwise the present set of domicile should be maintained, and that the introduction of ordinary residence here of three years for wives as founding jurisdiction under Section 18 of the Matrimonial Causes Act of 1950 may lead to serious anomalies.

3. Another point of view is that the courts of this country should not be closed to any person whose connection with and residence in England have been practically permanent for many years, although it may be that the person concerned is a foreign national. Those who support this point of view might well approve the proposition that Section 18 be extended to husbands who have had their ordinary residence in England for upwards of three years, notwithstanding that they continue, in English law, domiciled abroad. In that event both in regard to husband and wife suits the English law of divorce and nullity would be applied under Section 18 (3) of the Act of 1950.

4. As regards nullity, as I pointed out in my original memorandum submitted on behalf of the International Law Association (see Paper No. 130), and as Professor Norman Bentwich emphasised in an article in the *Year Book of International Law*, 1945, the ecclesiastical courts in this country based their jurisdiction on residence, and by statute that jurisdiction is still the law of the land in nullity of marriage.

5. I have already expressed the view that to give a wife a separate domicile for the purposes of divorce might create more anomalies than it would remedy. A further illustration of difficulties which would arise if a wife were accorded a separate domicile for this purpose is as follows:

An Englishwoman domiciled in England marries a man domiciled abroad and lives with him abroad for many years. She returns to England with the intention of divorcing him on a good ground in English law, but unless she let an interval of two or three years elapse the court might find it difficult to say that *omnis et facta* she had reverted to her domicile of origin in England. But she would have no difficulty in obtaining a divorce after three years' residence in England under Section 18.

6. Moreover, the premise that domicile should be the test of jurisdiction for all matrimonial causes would wipe out for wives the jurisdiction based on residence, which in some measure still exists in respect of nullity, judicial separation and restitution of conjugal rights independently of the statutory prescriptive period of three years' ordinary residence, unless of course these bases of jurisdiction, inconsistent and confused as they may be, were especially preserved.

7. By giving a wife a separate domicile merely for the purpose of founding jurisdiction in divorce one would confer on her a double domicile, e.g., an Englishwoman domiciled in England marries a Canadian domiciled in a Canadian province. They live together there for ten years. Then there is a break. She returns to England. The husband lives with another woman. She can divorce him either in Canada without question or in England if she can satisfy the court that she has re-acquired a domicile here. But if the test of residence for three years, or two years if deemed fit, were applied the anomaly of jurisdiction founded on one of two domiciles would be avoided.

8. The fact that a separate domicile is allowed to wives for the purposes of divorce in most of the States of the U.S.A. and in British Dominions should not be relied on. Jurisdiction in divorce exists in nearly all the States of the U.S.A. The provision of a separate domicile for a wife was mainly intended for inter-State and not external purposes. If there were a uniform jurisdiction in the whole of that vast nation, the need for a separate domicile would, in all probability, never have arisen. The same applies to the separate provinces of Canada, Australia and South Africa, all federated countries. The only exception is the

Dominion of New Zealand where there is only one jurisdiction. Having regard to the comparatively small population of New Zealand, and to the fact that so many New Zealanders are of Scottish blood, it is open to question if this law was not passed to cover a comparatively small number of cases.

9. I am duly impressed with the need of preventing the evil of migratory divorces on a large scale in England. It appears to me if (a) where the marriage has been in England the basis of jurisdiction in divorce is at least three years' ordinary residence for whichever spouse petitions; and (b) where the marriage is abroad the basis is three years' ordinary residence in England by both spouses, we should have a simple solution of the problem, with the alternative of the test of domicile as understood in English law.

10. As regards nullity of marriage, the opportunity might be taken of repealing those sections which throw the court's jurisdiction back on that of the ecclesiastical courts, and substituting the following by Parliamentary enactment:—

(a) where the marriage took place in England, either spouse to be able to sue for nullity here, whatever the supposed domicile, providing that the petitioner has been ordinarily resident in England for at least three months immediately preceding the presentation of the petition.

(b) where the marriage took place abroad if both spouses have been ordinarily resident in England during the six months immediately preceding the presentation of the petition, either spouse may sue here for nullity of marriage.

(c) the English law of nullity to be applied under both (a) and (b).

11. The reason for cutting down under paragraph 10 (b) the three years' period of ordinary residence prescribed by Section 14 (1) (b) of the Matrimonial Causes Act, 1950, in respect of wives is that nullity of marriage, i.e. establishing that there was no marriage, often demands prompt action, as where incestuous unions or those cases which necessitate the presentation of a petition within a year of the ceremony of marriage. Two English people might go through a form of marriage in Paris or some other place abroad, and one or other might desire to take prompt action to have it annulled. This recommendation,

it is submitted, would get rid of the difficulty made prominent in *De Reneville* (1948) P. 100 of preventing a person originally domiciled in England from obtaining a decision from the English court whether his marriage was valid or not.

12. As regards judicial separation in as much as the grounds are the same as in divorce, I would propose that the basis of jurisdiction should be the same as I recommended in paragraph 9 above.

13. As regards restitution of conjugal rights (probably a vanishing form of matrimonial relief), I would retain the present basis of jurisdiction, i.e., both parties resident or domiciled in England at the institution of the suit or a matrimonial home in England when cohabitation ceased.

14. The suggestion that if a husband domiciled abroad is allowed to sue for divorce in England, the English court must adjudicate the matter on the basis of his personal law, whether that of his domicile or nationality, seems to me to raise practical difficulties, in which the expense of proving foreign law looms largest. The suggestion that the English courts should be able to dissolve marriages on any ground good in English law, whatever the nationality, domicile or residence of the parties, goes too far.

15. It will be observed that I emphasise the basis of residence for jurisdiction in divorce as co-equal with domicile. My reason for that is that in most courts on the Continent residence is the substantial basis of jurisdiction, the rigid test of domicile as known to English law being rejected in favour of the notion of the principal place of residence. By placing domicile on the same level as residence as a basis of jurisdiction the English courts will be better enabled to recognise foreign decrees pronounced by competent courts on the basis of the principal place of residence. Nor do I see any objection to recognising decrees made by foreign competent courts on the basis of nationality, where according to the law governing the national that is the basis of jurisdiction.

16. Finally, as regards the British Commonwealth and Colonies, it should not be difficult to effect a uniform system of jurisdiction in divorce and nullity with the model of the Colonial and Other Territories (Divorce Jurisdiction) Act, 1950, in mind.

(Dated 25th November, 1952.)

## PAPER No. 132

### MEMORANDUM SUBMITTED BY MR. WALTER RAEBURN, Q.C.

#### A. Existing anomalies

1. A marriage which is intended to effect the voluntary union of one man and one woman for life to the exclusion of all others, and is celebrated in a form recognised as apt to effect such a union according to the law of celebration is recognised as a valid marriage in English law,

provided (a) that each party to it had, according to the law of his or her respective domicile, the capacity to contract a marriage, and

(b) that however readily such a union may be dissolved by the appropriate court, so long as a judicial decree of some sort is required to effect a dissolution, the intention that the union should be life-long and exclusive will be presumed.

2. Seeing that, in English law,

(a) only the court of "the domicile" has jurisdiction to entertain a suit for dissolution; and

(b) "the domicile" is always and throughout the husband's domicile for the time being; the husband alone can (at least in theory) choose a domicile which will enable him either to secure or avoid a divorce, according to his desire.

3. Since the laws of certain other countries, and in particular of some of the American States, will purport to dissolve marriages which English law persists in recognising as valid and subsisting, the "limping marriage" (whereby parties are bound together in one country and free to re-marry in another) commonly occurs.

#### B. Objectives

4. The main evil to be avoided is the fortuitous dependence of the status of marriage on the domicile which the law attributes to the parties on the strength only of

what are found or presumed to be the intentions of the husband. Since standards of social morality, as reflected in public policy, differ widely from country to country (or state to state), the only satisfactory criterion for determining and regulating the status of marriage in any given case must be the public policy prevailing in the country (or state) in which the parties have chosen to set up their matrimonial home. Where both spouses find themselves out of harmony with that policy, their choice lies between either accepting it nevertheless or migrating to a country (or state) where the public policy runs their own outlook. Where only one of the spouses disagrees with the prevailing policy, there is no reason why the views of that spouse should be regarded rather than those of the other. For better or for worse they concurred in choosing the land of their matrimonial home, and it seems just enough that either should be entitled to hold both to the consequences of its public policy. Their artificial "personal law" should be irrelevant.

#### C. Difficulties

5. Unless and until all the world either—

(a) adopts and enforces a uniform public policy, or

(b) practises toleration to the virtual exclusion of any public policy leaving everyone to follow his or her own conscience,

there must inevitably be "limping marriages". The "limping marriage" must therefore be accepted as a necessary evil, undesirable, and even scandalous, as it must be felt to be. It is obvious that hypothesis (a) is outside the range of practical possibility, while (b), even if superficially laudable, would, of its very nature, imply moral anarchy and the absence of any social standards at all. It is in any case equally impracticable.

6. While it is grossly unfair that a wife should be dragged by the hair from one domicile to another, having on each occasion to accept as her personal own the laws and standards of the new domicile; or, where her husband has deserted her for an unknown destination, that she should be left helpless and in ignorance of the identity of the domicile he has forced upon her; it is even worse if she is free to claim an independent domicile of her own. Inevitably if the right to dissolution of a marriage is made dependent on the law of the domicile of the husband equally with the law of the different domicile of the wife, cases must arise in which there is an irreconcilable conflict. If, to resolve the deadlock in such cases, one law or the other has to prevail, the solution is only to bring back the very mischief which exists today—the subjection of one spouse to the law of the domicile of the other. These difficulties are familiar in the United States of America, where in practice recourse is had to public policy in order to provide some kind of ultimate authority according to which matrimonial tangles must be unravelled.<sup>1</sup>

7. Even assuming that it were workable for the spouses to have independent personal laws, and indeed if the principle of "one marriage, one personal law" were to be maintained, the problem of the choice of law remains. In English law, the criterion is domicile. But "domicile" as understood by the English courts differs in important respects from "domicile" as understood by American, and still more by French and other Continental courts, resulting accordingly quite often in the choice of a different and conflicting law. Still more, in about half the countries in the world, the criterion of the personal law is not domicile at all, but nationality. Where, therefore, as in England, the courts decline jurisdiction altogether unless the personal law of the parties is that of the forum, the English court would refuse to entertain a suit for divorce of British nationals domiciled in a foreign country, while the foreign court would, for its part, refuse to exercise its jurisdiction to divorce British nationals. Equally, the husband might petition for divorce in the courts of his domicile and the wife might petition in the courts of her nationality, with results which could easily conflict with one another.

8. Property rights are another aspect of divorce in which a serious conflict may arise. Apart from formal and statutory marriage contracts (determining as between "community of goods" and "separation of goods") so usual in certain countries, questions of right to maintenance and to the support of the children of the marriage are affected by decrees of divorce, and vary according to the forum in which the decree was obtained. Mutual recognition by different countries (or states) of each other's divorce decrees can lead to very oppressive consequences in the matter of enforcement or evasion of these obligations. This is the experience of some States in America.<sup>2</sup> Thus, a husband, having wrongfully deserted his wife, may go abroad to a country in which he can obtain a dissolution of the marriage on some ground not recognised in the country in which they had their home. If foreign decrees of divorce were mutually recognised the unoffending wife might thereby find herself deprived, as a consequence of such a decree of all right (even in her own country) to support by her unfaithful husband. Conversely, a wife might go abroad, divorce an innocent husband against his will, and thereupon obtain an order for maintenance, for which she could, on the assumption predicated, secure recognition and enforcement against him at home.

#### D. Suggested remedies

9. In matrimonial causes, the "personal law", whether based on domicile or nationality, should be discarded as irrelevant. Public policy towards marriage and divorce transcends even the personal interests of the parties.

10. Accepting the "limping marriage" as a necessary evil, except as between countries (or states) in which identity of public policy enables a satisfactory convention for the mutual recognition of decrees to be made, the courts of each country should be recognised as competent to pronounce decrees of divorce, with a validity limited to their own jurisdiction, in respect of any marriage whatsoever.

11. As regards English law, it should be open to a party to a marriage, purporting to have been dissolved by a foreign court and wishing to have it similarly dissolved in England, either—

(a) to take, as at present, independent proceedings in England on some ground recognised in English law; or

(b) where the grounds on which the marriage was dissolved abroad coincide with grounds on which it could have been dissolved in England, by some cheap and simple process to have the foreign decree re-issued (or adopted or "homologated") by the English court; or

(c) wherever there is a convention between the United Kingdom and some other country for the mutual recognition of decrees of divorce, and the decree has been obtained in the courts of a convention country, merely to register the decree in England, and thereupon to give it the force of an English decree.

12. English courts would, for their part, assume jurisdiction to dissolve, according to English law, every marriage in respect of which a party petitioned on proper grounds for dissolution, regardless of domicile nationality residence or other personal qualification.

13. As regards property rights, however, here the case for the transcendence of public over private interests cannot, it is submitted, be sustained. There should therefore be a different rule for the choice of law from that applying to the marriage itself. Apart from its social significance, marriage has a contractual aspect relating to the property of the respective parties, and, where (as in normal cases) the husband is the breadwinner, relating to the support of the wife and children. Dissolution of the marriage necessarily disturbs the assumptions upon which that contract is based. There are two ways in which this disturbance may be resolved—

(a) by ascertaining, according to the ordinary conflict rules relating to contracts, the proper law of the particular marriage contract under consideration, and applying that law; and

(b) by ascertaining the express (if any) and implied terms of the marriage contract according to English law, and treating the dissolution as a breach by one party of the contract, resulting in a right of the other party to damages.

14. On the basis of ascertaining the proper law of the contract, the parties should not, it is thought, be held to the law which they had in their contemplation at the time of the marriage, but rather to that according to which, by consensual variation, their matrimonial relations were governed when they last enjoyed a matrimonial home together. Even where there is a written or a statutory marriage contract and the parties have abandoned their original country for one in which the laws are different, it may be possible to apply the law of the latter country to the contract made in the former, perhaps on the above suggested principle of variation by implied mutual consent. Or the contract may be so absolute and explicit in its terms as not to admit of variation. That should be a question of fact. The broad principle, however, should be that whatever property rights the parties respectively would have enjoyed according to the law of their marriage contract, they shall still enjoy, notwithstanding any local dissolution of the marriage. Thus, a marriage dissolved in England, in which the proper law of the marriage contract is found to be Irish law, will leave the spouses with the same mutual rights and obligations as regards property as if they were still husband and wife; since in Ireland, the English divorce will not be recognised, and in Irish law the parties will still be married. In short, while the English law the parties will (on grounds available in English law) set the courts free to re-marry, they will leave untouched whatever may be their financial relations with one another according to the appropriate foreign law. This may mean either, (a) that the English decree being of territorial validity only, the parties, unless the proper law of their marriage contract is English, will always be treated as still married for purposes of property rights unless and until the English decree is homologated according to the law of their marriage contract, or (b) that the latter law, being the law of a convention country, the English court may assume automatic recognition of the English decree, or (c) that the marriage having been dissolved in England, the parties voluntarily consent to a variation of their contract, it may be by submitting to English law, or by applying the proper law of the contract and assuming an homologation of the English decree, or by entering

<sup>1</sup> See, e.g., *Williams v. North Carolina I* (1942), 317 U.S. 287; *Williams v. North Carolina II* (1945), 325 U.S. 226.

<sup>2</sup> See, e.g., *Madock v. Madock* (1906), 261 U.S. 582.

expressly into a new contract subject to the approval of the English court.

15. The alternative basis of treating the marriage contract as broken, has the merit of calling for no choice of law. The terms of the contract having been ascertained as a fact, the English court will proceed to apply its own rules as to the measure of damage, somewhat on the analogy of a fatal accident case. Where a wife and children have lost their husband and father, the question will be what loss, in terms of money, have they so suffered. Their respective ability to earn their own living, the wife's prospects of re-marriage, and the like factors should all enter into the calculation. So, as regards the wife herself, should any share of her own in contributing towards the breakdown of the marriage. This factor may well operate to the complete extinction of the husband's liability in damages. On the other hand, a husband who has, by his wife's sole fruit, lost the benefit of her services as a housekeeper and guardian of his children, may, on his side, be entitled to damages against his wife. But this

system, though having the advantage of simplicity, seems to beg the main question whether, according to any law other than that of the fortuitous place of dissolution of the marriage, there has ever been a dissolution, and hence a breach of contract, at all. It could only operate justly and effectively where both parties were voluntarily and permanently residing somewhere within an area comprising the country of the court by which their marriage was dissolved and another country (or state) which recognised such dissolution. It might perhaps be applied to such cases, leaving the other method to be applied in all other cases.

16. The net result is that while the institution of marriage, being subject to public policy, should be dealt with everywhere on a territorial basis, leaving conflicts to be avoided, where possible, by conventions, the marriage contract, being a matter of private law, should come, as far as possible, within the scope of the ordinary conflict rules relating to contracts, independently of whether the marriage is or is not locally regarded as dissolved.

(Dated January, 1952.)

## PAPER No. 133

### SUPPLEMENTARY MEMORANDUM SUBMITTED BY MR. WALTER RAE BURN, Q.C.

#### Discarding the personal law

1. Whatever the difficulties in applying a personal law in matrimonial cases, they may seem at first sight to be outweighed by those which would be presented if it were to be discarded. If English decrees of divorce, it might be argued, abandoned all pretension to more than territorial validity, then, in the absence of conventions, everyone divorced in England would nevertheless remain married in the rest of the world. Therefore, such conventions being outside the region of practical possibilities, the abrogation of a personal law would, so the argument should run, merely introduce more uncertainty, confusion and misery into matrimonial relations.

2. It is, however, submitted that such an argument would be unsound.

3. Let it be assumed that English law no longer recognised any personal law in relation to matrimony, whereas the laws of all foreign countries remained exactly as they are at present. The absence of any conventions dealing with such a situation may also be assumed. In England, then, the courts would entertain the matrimonial suits and pronounce, in strict accordance with English municipal law, upon the matrimonial status of any parties whatsoever who were properly before the court in the procedural sense.

4. In such event, it would be quite incorrect to assume that other countries, applying their own conflict rules, would necessarily refuse recognition to the decrees of English courts. On the contrary, applying the personal law, each in their own way, such countries would, in their courts, recognise precisely the same English decrees as they do at present. Thus, persons enjoying both British nationality and an English domicile (being the overwhelming majority of those affected) could claim recognition of an English decree wherever they went; those enjoying British nationality only, could claim such recognition wherever nationality was the criterion of the personal law; and those generally resident in England would (just as at present) have their decrees recognised wherever such residence fell within the local definition of domicile, and "domicil", as so defined, was the relative criterion.

5. So for the position would remain quite unchanged. It would be the English decrees pronounced in those cases in which the parties had no personal connection with English jurisdiction at all that would create a new situation. It is therefore necessary to look somewhat critically into such cases. In abstract theory they could occur without limit. For all practical purposes, however, they could rarely occur at all. There would be the following safeguards against their occurrence—

(1) No English court would entertain a collusive petition for divorce. This would rule out the abuse of English jurisdiction by a couple who came by arrangement in England to secure a divorce which they could not obtain in the country in which they had been living and to which they intended to return.

(2) No English court would grant a decree of divorce *ex parte*. This would rule out the abuse of English jurisdiction by one spouse visiting England in order to divorce the other who stayed at home and was not properly served with the English proceedings.

(3) A divorce for which no extra-territorial recognition could anywhere be claimed would present no attraction to any but those who intended to settle within the jurisdiction. This would rule out all "fly-by-night" divorces.

(4) Whatever the parties were, the petitioner would still have to satisfy the English court that there were genuine grounds for a divorce in accordance with English law. This would rule out all frivolous and unmeritorious cases.

5. When such safeguards are taken into consideration, the likelihood of the abrogation of the personal law leading to an appreciable number of cases in which a mere convenience is made of the English courts is practically negligible.

7. What might present a little difficulty is to define the conditions upon which, in the absence of a personal law, English courts should recognise foreign divorces. Strictly, no foreign decree should have any validity outside the jurisdiction of the forum in which it was pronounced. As a matter of comity, however, a decree pronounced on grounds which would have entitled the petitioner to relief in England, should, if both parties were before the foreign court and there was no collusion, entitle the same petitioner to have the decree extended (even in the absence of a convention) by some cheap and simple process in England. Further, if, though the actual grounds on which the decree was pronounced would not have been availed in England, facts were proved at the hearing which would have afforded grounds for an English divorce, this, too should suffice to support an extension of the foreign decree. In other cases it might be necessary to petition independently in England. That would only involve proving a case on its merits, and it would not arise unless there were serious grounds (such as a desire of one of the parties to re-marry in England) for requiring an English decree. Difficulty might conceivably arise if, say, a wife had divorced her husband for adultery in France, and the husband wished to re-marry in England. The former wife might be quite unwilling to help the husband to obtain an English decree, and he, for his part, would have no independent ground for divorcing his wife in England. The English law would have to provide against injustice in such a case. This it might do by allowing either party to a foreign divorce to establish in an English court the facts (even if they were against himself) which were before the foreign court when it pronounced its decree.

8. For the above reasons it is submitted that there should be no insuperable difficulty in the way of immediately discarding the personal law in England without the necessity for any convention.

(Received July, 1952.)

## PAPER No. 134

## MEMORANDUM SUBMITTED BY SIR ERIC BECKETT, K.C.M.G., Q.C.

1. In submitting this paper I must emphasise that the views expressed in it are those of myself as an individual. Though they are naturally based on my experience as Legal Adviser of the Foreign Office, this paper does not in any way purport to express the official views of the Foreign Office.

2. This paper deals exclusively with the private international law aspects of the question, and I have therefore read with particular interest the papers of Professor Cheshire, Professor Graveson, Mr. Rastbury and Mr. Lacey. I do not propose to offer any observations on the principal aspect of the Commission's work, namely the grounds on which it is desirable that parties to a marriage should be able to obtain a divorce decree from the courts of this country.

3. The general approach to the private international law aspects of divorce, which anyone constantly seeing the problems which arise within the sphere of the Foreign Office would favour, would be the adoption of rules which were calculated to diminish the conflicts of laws resulting in parties being regarded in this country as married and in other countries as divorced or vice versa. I am naturally, therefore, drawn in the direction of the recommendations in the memorandum submitted by Mr. Lacey, these being recommendations which it is hoped would diminish such conflicts, particularly between European countries. I do not, however, feel able to go as far in this direction as Mr. Lacey's memorandum does. It seems to me that any country which has an internal system, under which divorce can only be obtained under certain rather limited conditions, deliberately adopted as a matter of policy in the interests of family life, must protect the system which it has deliberately adopted from being too readily evaded, by what has been referred to as " migratory divorce ".<sup>1</sup> Such a country cannot go more than a certain way in recognising the jurisdiction of other countries, and in my opinion the proposals submitted by Mr. Lacey go rather too far. My own suggestions, which owe something both to Mr. Lacey's paper and to that of Professor Cheshire, appear in the following paragraphs.

4. Before developing my suggestions I feel it necessary to say something about the conception of domicile, as I think it inevitable that domicile will at any rate continue to play some part in the rules for determining jurisdiction. Moreover, I personally consider that domicile should still play an important part in the rules to be adopted, but I wish to make two suggestions with regard to the conception of domicile itself, namely:—

(i) that I think English law must abandon the position that the domicile of a wife follows that of her husband, and

(ii) that I think our present conception of domicile needs some slight amendment to reduce what has sometimes been referred to as the apparently " limpet-like " character of the domicile of origin.

5. As regards the first of these suggestions, I feel that it is really impossible to justify, in the context of life to-day, a rule that the domicile of the wife automatically throughout marriage follows that of her husband. It is a long time now, since our law, as well as the laws of practically all other countries, has recognised that a wife is independent as regards her nationality and may have a nationality different from that of her husband. I think myself that, even as a mere matter of logic, it should now be accepted that a wife retains legally an equal independence as regards her domicile. In the ordinary way, of course, the domicile of the husband and wife would still be the same, because the domicile of each of them will, under the ordinary criteria, be situated where they set up their joint home, a home which they believe to be permanent, and this will be even more generally so if the other slight change in our conception of domicile, which forms my second suggestion under this head were adopted. When the marriage begins to break down and the parties are separated and no longer ready to live together, then I consider that each of the spouses must be free to acquire a separate domicile. Even where a

marriage has not broken down but may be perfectly harmonious, the circumstances may be such that the domicile of the two spouses will be different.

6. Where the domicile of the spouses is different and where jurisdiction depends upon domicile, then I consider that either of the parties should be able to obtain a divorce in England if he or she is domiciled here, and that the English courts should recognise as valid and effective so far as that party is concerned a divorce by other party obtained in another country in which that party is domiciled, even though the divorce is not recognised in the country of the domicile of the other party and in consequence (in my view) the English courts must still regard the other party as married.

7. As regards my second suggestion on domicile, while I think that the basic principles of the present English conceptions of domicile are sound, I consider that recent decisions of the highest tribunals have, by stressing too much the rather subjective requirement of *animo* to the detriment of the other purely objective requirement of *factum*, introduced an unsoundness into the conception, which makes the English conception of domicile move even further away from the continental conceptions as well as producing a situation where it is almost impossible in many cases to advise with any confidence what the domicile of a party is, because the strongest objective evidence in the form of residence and the circumstances of residence may be held to be completely rebutted by the production, for instance, perhaps after the death of the person concerned, of some letter indicating a sort of nostalgia for the country of origin and a sort of vague intention of returning there some time, and such a letter is held to prove that the person concerned had never acquired domicile in the country in which he had lived for a very long period of years without apparently having had any definite plans for returning to his domicile of origin. There may even be something to be said for a rule which makes a continuous residence of ten years or more constitute domicile in the absence of proof of the clearest and most definite plans for returning to the country of previous domicile, though I do not mean that this or any particular period of residence should be a *sine qua non* for a change of domicile.

8. Turning to the question of the rules which might govern jurisdiction in divorce, there are, of course two aspects of the question, the rules which should determine when the English courts should exercise jurisdiction and the rules which should determine when the jurisdiction of foreign courts should be recognised. Here I wish to stress personally, what has already been said in an official paper at which the Foreign Office has concurred, that there is the strongest reason why the same rules should govern both aspects of the question. I wish to add personally that it, as may be, there is any difference between them, then the difference should not take the form (as it does now) of the English courts exercising jurisdiction in cases where they would not admit the jurisdiction of the foreign court but rather of the English courts being a little more liberal in recognising the jurisdiction of foreign courts than they are in exercising jurisdiction themselves. This may appear at first sight to be a strange view, but I think that, on reflection, it does not appear so strange. In the first place, from the point of view of my experience in the Foreign Office, I have seen many and most harmful conflicts resulting from the inability of the English courts to recognise a foreign divorce. The inability in a particular case of the English courts to exercise jurisdiction does not create a conflict though admittedly it may constitute a hardship. But on this matter I invite reference to paragraph 13 (a) below. A further reason for my view on this point will appear later when I come to deal with what the rules in regard to jurisdiction might be (see paragraph 13 below).

9. Since, as I have already said, the difficulties which are encountered in doing Foreign Office work arise from conflicts due to the fact that the English courts cannot recognise divorces granted in foreign countries, I shall begin my approach to the question of the rules to determine jurisdiction by considering this aspect of the question first, which, admittedly, is not the usual approach. I recommend in the first place that the English courts should continue to recognise divorces granted in the country of the domicile or which would be recognised by the courts of

<sup>1</sup> In this general connection a recent note by the Australian Professor Fleming entitled " Eviction of Law and Divorce Adjudication " which appears at page 181 of the number of the *International and Comparative Law Quarterly* for July, 1952, is worth attention.

that country. In this connection I invite attention to paragraph 4 above where I have made two suggestions with regard to the conception of domicile itself.

10. At one time it was thought, though the authority for it was mainly *dicta*, that the English courts would refuse to recognise a divorce granted by the country of domicile, which was valid in that country if the proceedings were held to be contrary to natural justice because one of the parties had not received what the English courts would conceive to be adequate notice of the proceedings. It would appear that the most recent decisions have nearly, if not quite, given the *quiescent* to this view, at any rate unless the Court of Appeal or House of Lords should overrule recent decisions given in first instance. I think it is most desirable that the validity of a divorce, which is valid in the country of domicile, should not be open to question on any such grounds. It must be seldom, if ever, that it is to the benefit of any party that the English courts should take such a view and, as long as the essential core of our system in regard to jurisdiction and divorce is based on domicile, on the ground that the courts of the domicile must be predominant, if not exclusive, in the realm of personal status, I think it is inconsistent to refuse to recognise divorces of the courts of the domicile on the ground that they are contrary to natural justice. Turning to the other side of the question, I should also recommend that the English courts should continue to be able to exercise jurisdiction in divorce where the domicile is in England.

11. Secondly I think there is very much to be said for a rule under which the English courts would also recognise the jurisdiction in divorce of the country of the nationality. Where the nationality of the spouses is different, as nowadays it may be, my recommendation would be the same, *mutatis mutandis*, as that given in paragraph 6 above with regard to domicile where the domicile of the two spouses is different. In cases of double nationality (i.e., a spouse has two nationalities) there is much to be said for the application of the master nationality rule, i.e., where one of the nationalities is British, then the English courts will not recognise the jurisdiction of the foreign court based on nationality alone. Where neither of the two nationalities is British, then I think the English courts should recognise a divorce granted in either of the countries of the person's nationality.

12. But it may be said that, if this principle of recognising foreign divorces granted by the courts of the nationality is adopted, it works well enough in regard to countries like France, which have a unitary system of law and where jurisdiction has always been recognised on the basis of nationality, but it may be questioned whether it works in regard to countries which contain many systems of internal law or in regard to countries which have not adopted nationality as a criterion for jurisdiction at all. One might take the U.S.A. as an instance, which combines both these factors. In such a case I think the answer would be that the English courts would recognise any divorce of an American citizen granted in any part of the United States, if the divorce is one which, under the American constitution (full faith and credit clause) the Supreme Court of the United States would hold to be one which all States in the United States must recognise. In other words, in such a case it is the view, which the Supreme Court of the foreign country concerned would take on the question whether the divorce was granted by a court of competent jurisdiction within the foreign country which should be the test which our courts should adopt. So far as the United States is concerned it is the fact that there are now quite a number of decisions of the Supreme Court of the United States on precisely this type of point.

13. Then it is necessary to turn to the other side of the question and consider (a) whether the principle of nationality could be adopted by the English courts, and (b) if not, whether that is a fatal objection to the principle being accepted in connection with the jurisdiction of foreign courts. To answer the latter question first, I should recommend the answer "No". The principle of nationality as a ground for jurisdiction in divorce is in itself a sound principle and adopted by a great many countries and the mere fact that because of certain internal complications this country does not choose to adopt this principle as one on which its own courts will have jurisdiction is not a reason why they should be obliged to refuse to recognise foreign divorces where jurisdiction is claimed on the basis of this principle (*vide* paragraph 8 above). But, to return to the first question,—Is it impossible for the principle of nationality to be adopted as an alternative basis of jurisdiction for the English courts? For this purpose British

nationality would be citizenship, i.e., citizenship of the United Kingdom and colonies, and our courts would recognise that citizenship of Canada, Australia, etc. constitute nationalities and that the jurisdiction of Canadian or Australian courts could be recognised on this ground. But of course the entry described as the United Kingdom and colonies still contains a very large number of different internal systems and jurisdictions within it. I suggest, however, that it would be possible to adopt a rule that the English courts may have jurisdiction to dissolve the marriage of any citizen of the United Kingdom and colonies, who is not domiciled in some other portion of the United Kingdom and colonies. Such a rule would enable citizens of the United Kingdom and colonies who are domiciled or resident in foreign countries to have recourse to our courts without impinging on the jurisdiction of other systems within the United Kingdom and colonies to dissolve the marriages of persons, who are domiciled within their jurisdiction. It would, of course, be a matter for consideration whether the same principle should not be applied to Scottish courts and the courts of colonies so that a Scottish court (or a colonial court) would have jurisdiction to dissolve the marriage of any citizen of the United Kingdom and colonies, who was not domiciled within some other portion of the United Kingdom and colonies. But this is a matter on which no doubt the Legal Adviser of the Colonial Office would be better able to express an opinion. I have however reason to believe that in general he agrees with me.

14. Having, in the previous paragraph, recommended jurisdiction on the basis of domicile and jurisdiction on the basis of nationality, there remains the question whether jurisdiction should also be exercised or recognised on any other basis, for instance a period of residence in the territory. Here I cannot go as far as Mr. Lacey does in his paper. I do not think it is proper to accept jurisdiction on the basis of residence of two or three years or indeed on the basis of any residence short of a very long period such as ten years, unless the "cumulative system" recommended by Professor Cheshire is introduced as well. That is to say, that the English courts, if they are given jurisdiction to dissolve the marriage of persons who have merely been resident in England for two or three years, should also be required not to grant a divorce except on a ground which is recognised as a valid ground for divorce in the countries in which the persons concerned are domiciled or in which they have their nationality. I am aware of the difficulties and indeed the objections which have been felt at the introduction of the application of foreign law in the matter of the grounds for divorce, though I am inclined to think that having regard to the extent to which, in divorce and nullity cases it is already necessary to have recourse to foreign law to determine questions which are necessary for the decision, the objection may have been over-stated. On the other hand I am myself convinced that, unless the cumulative requirement is added, this country would be left without an adequate protection for its own system against migratory divorce and that in addition too many conflicts would be created, if the English courts exercised jurisdiction merely on the basis of two or three years' residence because in so many cases the English divorces would not be recognised in foreign countries. In a word, I recommend the adoption of a principle of two or three years' residence as a ground for the exercise of jurisdiction in divorce or for the purposes of the recognition of foreign divorces only if there is added the requirement that the divorce should only be granted on grounds which would be recognised under the law of the country of nationality or domicile. The additional requirement will not eliminate all conflicts but it would reduce them and in any case it would show that the English courts will not become a Mecca for those migrating for the purposes of divorce.

15. Having now submitted my recommendations of a positive character, I should like to add a few remarks of a negative character. (a) It is highly desirable that we should avoid in future complicated special provisions to cover hard cases. I believe that the bulk, if not all, of the hard cases which have influenced the complicated and special provisions which have appeared in recent legislation (provisions which I should like to see repealed and never renewed) are avoided, if the general jurisdictional principles which I have indicated in previous paragraphs were adopted, particularly the proposal that a married woman may have a domicile separate from her husband. But hard cases always seem to arise and attract sympathy, and complicated pieces of legislation specially adopted to meet them are, I venture to think, in this field at any

rate generally bad laws. There are certain cases which may arise which will always seem hard, namely the position of a person who is a national of and domiciled in a country which does not permit divorce at all, but in my opinion special legislation to meet such cases is really an infringement of our duty to respect the system of another country, which is entitled, if it so wishes, not to permit divorces at all for those people who are within its system, both by nationality and by domicile. (6) Secondly, I strongly urge that none of the rules which we adopt as regards the recognition of foreign divorces should be made specifically contingent on the recognition of the jurisdiction of the English courts in a like case. I do not think the introduction of complicated reciprocity conditions in this field is in any way appropriate.

16. In conclusion, I wish to say that I have confined my

remarks exclusively to divorce and said nothing about nullity of marriage. As far as I know, the private international law aspects of nullity of marriage are not at present within the purview of the Commission. But I am of the opinion that the two sets of rules, the rules regarding jurisdiction and choice of law in divorce on the one hand and nullity on the other hand really should be looked at together and that it is desirable that there should be a consideration of the private international law aspects of nullity of marriage as well as of divorce.

17. In this paper I have ventured to put forward certain views. In ending, I wish to emphasize not only that they are my personal views based on the experience of my own work, but also that they are tentative views, and I am fully conscious that there is much that I may have overlooked and that I may not have given the matter the same sustained study which other people have done.

(Received August, 1952.)

## PART II

## (a) INFORMATION AS TO THE FINANCIAL POSITION OF A SPOUSE

## (b) PROPERTY RIGHTS OF HUSBAND AND WIFE

(NOTE.—A number of organisations were asked to give their views on proposals made to the Commission relating to (a) the disclosure to one spouse of the financial position of the other spouse, and (b) the property rights of husband and wife. The letter which was sent on behalf of the Commission and the replies thereto are reproduced below.)

## PAPER No. 135

## LETTER SENT ON BEHALF OF THE COMMISSION

8th June, 1953.

## INFORMATION AS TO THE FINANCIAL POSITION OF A SPOUSE

1. The suggestion has been made to the Commission by a number of witnesses that each spouse should be entitled by law to be informed of the financial position of the other. Practical methods which have been put forward for implementing this proposal are:—

(a) That either spouse should be able to obtain a copy of the other spouse's pay slip from that spouse's employer.

(b) That either spouse should be entitled to obtain from the appropriate Inspector of Taxes a copy of the other spouse's income tax return or P.A.Y.E. certificate.

In cases in which neither (a) nor (b) was applicable, either spouse should be able to apply to the court for an order that the other spouse should make a proper disclosure of his or her annual income.

2. The main argument advanced in support of this proposal is that by giving practical demonstration of the principle of equality of rights and obligations as between husband and wife, it would put marriages on a more secure foundation and would, in practice, save marriages from foundering on the rocks of financial disputes. Those who are opposed to the suggestion maintain that, on the contrary, it would only lead to domestic friction if each spouse had a legal right to obtain information as to the earnings or income of the other.

3. The Commission would be very glad to have the views of the . . . upon this proposal; in particular, they would wish to have its views on the suggested methods of implementation set out above.

## PROPERTY RIGHTS OF HUSBAND AND WIFE

4. The Commission would also be grateful for the views of the . . . on the following proposals for changes in the existing law governing property rights of

\* Note.—The part of the letter dealing with the property rights of husband and wife was not sent to all the organisations.

the spouses. These proposals would apply during the existence of the marriage as well as on its breakdown (by divorce or separation).

## (a) Savings from housekeeping money

(i) It has been suggested that in the absence of clear proof to the contrary, savings made from housekeeping money, and furniture, etc., purchased from such savings, should be regarded as the property of the wife, or alternatively, as the joint property of husband and wife.

(ii) An alternative proposal is that the court should have power to make such order respecting the allocation of the savings as seems to it equitable and reasonable having regard to all the circumstances.

## (b) Community of property in respect of the matrimonial home and its contents

## (i) The tenancy of the matrimonial home

It has been suggested that in the absence of any explicit arrangements to the contrary, husband and wife should be deemed to be joint tenants of the matrimonial home. In cases of divorce or separation the court should have power if necessary to apportion the rights of the spouses in regard to the tenancy.

## (ii) The ownership of the matrimonial home and/or its contents

It has been suggested that in the absence of any explicit arrangements to the contrary, the matrimonial home and/or its contents should be deemed to be the joint property of the spouses (notwithstanding that the contributions of the husband and wife to the purchase of the home and its contents may have been unequal). In case of divorce or separation the court should have power, if necessary, to decide on the occupation of the home and on how the contents should be divided.

## PAPER No. 136

## LETTER RECEIVED FROM THE GENERAL SECRETARY OF THE FAMILY WELFARE ASSOCIATION

29th June, 1953.

1. I am writing in reply to your letter of 8th June. As the next meeting of the Council of this Association will not be held until after the 7th July, the Chairman directed me to submit your letter to the Area Secretaries of this Association, all of whom are fully qualified social workers wholly engaged in family case-work. The Chairman agreed that they were well qualified to state the views of the Association on the questions contained in your letter.

I am requested, therefore, to submit the following as the views of this Association.

## INFORMATION AS TO THE FINANCIAL POSITION OF A SPOUSE

2. With regard to the first suggestion, that each spouse should be entitled by law to be informed of the financial

position of the other: we do not consider that proposal (a) or (b) would be a satisfactory procedure. In our view, it would increase domestic friction, since having obtained the information, it could only be used by the spouse who had obtained it declaring both the source and method by which it was obtained: and, in our view, it is difficult to imagine greater domestic friction than the knowledge that one partner had recourse to such a method. We do, however, feel that where a divorce, separation or maintenance order is already in question, or where there is real hardship, the third proposal that either spouse should be able to apply to the court for an order that the other should make a proper declaration of income, seems a reasonable request and would lead to a more equal share of financial responsibility in cases of separation, or where maintenance orders are made.

3. A further suggestion is made, that when magistrates decide to make a separation order, verification of income should be automatic and that in cases of hardship the magistrates should make an interim order, pending proceedings, through the Inspector of Taxes, for a copy of the other spouse's income tax return or P.A.Y.E. certificate.

#### PROPERTY RIGHTS OF HUSBAND AND WIFE

##### Savings from housekeeping money

4. The Association consider that, in the absence of clear proof to the contrary, savings from housekeeping money and furniture, etc., purchased from such savings, should be regarded as the property of the wife.

##### Community of property in respect of the matrimonial home and its contents

5. The Association considers that, in the case of divorce

or separation, the court should have power to apportion the rights of the spouses in regard to the tenancy.

6. In their opinion, it would be necessary for the Rent Restrictions Acts to be so amended as to make it obligatory on the landlord of a tenancy coming within the jurisdiction of the Acts to have the tenancy transferred to the appropriate spouse in accordance with the decision of the court.

##### The ownership of the matrimonial home and/or its contents

7. The Association consider that, in the absence of any explicit arrangements to the contrary, the matrimonial home and/or its contents should be deemed to be the joint property of the spouses; and, in case of divorce or separation, the court should have power to decide on the occupation of the home and on how the contents should be divided.

### PAPER No. 137

## MEMORANDUM RECEIVED FROM THE GENERAL SECRETARY OF THE MAGISTRATES' ASSOCIATION

1. The Association has considered the matters raised in the letter from the Royal Commission on Marriage and Divorce of 8th June, and submits the following supplementary memorandum setting out its views thereon.

#### INFORMATION AS TO THE FINANCIAL POSITION OF A SPOUSE

2. The Council assumes that this suggestion is not made merely to meet the situation which might arise upon the breakdown of a marriage, but should be applicable to all. While the Council does not doubt the need to secure equality of rights and obligations it considers the need to preserve the essential position of mutual trust and respect of much greater importance, and it does not feel that this suggestion would contribute to that trust and respect. It is, therefore, not in favour of this suggestion which it feels would be liable to cause endless domestic friction. In its opinion these proposals would not be necessary in the case of a happy marriage and would not be likely to assist in reconciling the parties where the marriage was in danger of breaking down. Where there was a financial dispute the exercise of any of these proposed rights by a spouse would show that the marriage was on a very insecure foundation and complete mistrust of the other would lead to further friction.

3. Where proceedings before the court have been commenced the obtaining of the necessary information as to the financial position of the parties gives little difficulty in practice. Where the court has to fix the amount of alimony or maintenance the parties can be sworn and are obliged to make a disclosure on oath. Before magistrates provision is made for the reception of a certificate by the employer as to the wages paid to either party (see, for example, Section 80 of the Magistrates' Courts Act, 1952) or the information can be obtained by the court welfare officers or probation officers by the direction of the court.

4. If the proposal set out above were adopted it would have to be implemented by all the three methods described, and would entail penalties being imposed upon employers if they failed to give the required information; in addition there would be an obligation on the tax authorities to supply the information and penalties laid down for a spouse who did not make a proper disclosure.

5. It would seem an unfair imposition on employers for the sake of a principle, and would mean further unproductive work. The right of a spouse to apply to the tax authorities for the required information would be open to abuse unless the spouse had first to establish his or her identity. It would also mean heavy demands of extra work on the tax authorities.

6. For these reasons the Council is opposed to the suggestion put forward and considers that the proposed methods of implementation are contrary to the rights of individuals to keep their affairs private.

#### PROPERTY RIGHTS OF HUSBAND AND WIFE

##### Savings from housekeeping money

7. The Council is generally in favour of savings from housekeeping money being the joint property of husband and wife. When the marriage breaks down the Council considers that the court should have unfettered discretion

as to the disposal of the savings, having regard to all the circumstances. The Council would stress that (b) should only apply when matrimonial orders of divorce, separation or maintenance are being made.

8. It should be pointed out, however, that the Association has been against magistrates dealing with such matters as the disposal of the tenancy of the house because of the subtleties in the law of landlord and tenant which are outside the scope of magistrates' courts, and this proposal may be objectionable for the same reasons.

##### Community of property in respect of the matrimonial home and its contents

9. The Council would refer the Royal Commission to paragraphs 54-55 of its memorandum of evidence submitted to them as set out below:—

"54. *Tenancy of the matrimonial home and ownership of furniture.* The Association has considered the suggestion that the law relating to the ownership of furniture and chattels should be amended to provide that the magistrates, when making a separation or maintenance order, could also make an order as to the ownership of the furniture and chattels in the matrimonial home. These suggestions have been urged in Parliament on more than one occasion. In 1925, during the passage through Parliament of what is now the Summary Jurisdiction (Separation and Maintenance) Act, 1925, a clause was introduced at the Report Stage and was withdrawn after a debate. At that time the Minister having the conduct of the Bill was not prepared to accept the clause because it laid down a new principle in asking the court to do something with regard to the division of property. Mr. Locker-Lampson, the Under-Secretary of State, then said: 'You are asking the magistrates to go entirely outside their jurisdiction and to say what they think ought to belong to the husband and what ought to belong to the wife'. At that time it was also pointed out that the furniture might have been bought under the hire-purchase system. A somewhat similar proposal was made in Parliament in 1951. In our opinion the suggestions would involve far-reaching changes of great difficulty and would necessitate special jurisdiction which magistrates do not at present enjoy.

55. A number of suggestions have been made that upon the making of an order the court should review the tenancy of any house occupied by the parties to overcome a hardship now suffered by the wife. Where there is a large family the housing shortage creates insuperable problems. The task of the wife with a number of children to find a new home within her means is impossible. Even where there are no children it is sometimes true that the financial position of the wife is insufficient to enable her to provide a home for herself. It is thought that the husband is frequently freer and this is certainly true where there are children.

56. It has been suggested that it might be possible to create some form of statutory tenancy in favour of the innocent wife. We do not feel able to make any recommendation on this proposal. At the Report Stage of the Summary Jurisdiction (Separation and Maintenance) Bill in 1925 a clause was introduced to

carry out this suggestion but it appears to have been withdrawn without debate."

10. The Council sees no reason to alter its previous opinion on the ownership of the matrimonial home and/or its contents. If a court had power to divide the contents an inventory and valuation would be necessary, which is a skilled job frequently requiring the services of

an expert, and the parties would seldom be able to agree about the details.

11. With regard to tenancy agreements the Council does not feel able to make any recommendation in view of the practical difficulties involved, thus supporting a previous decision arrived at in February, 1950.

(Dated July, 1953.)

## PAPER No. 138

### LETTER RECEIVED FROM THE SECRETARY OF THE NATIONAL ASSOCIATION OF PROBATION OFFICERS

3rd July, 1953.

1. The matters included in your letter of the 8th June were circulated to all Branches of the Association and have been discussed as widely as possible within the limited time available—it will be realised that all Branches have not been able to meet, but in some such cases copies of a circular embodying the Royal Commission's inquiry have been sent to individual members. Replies have been received from nineteen of our twenty-three Branches covering most parts of the country and every type of area, so may be regarded as representative of the views of the Probation Service.

#### INFORMATION AS TO THE FINANCIAL POSITION OF A SPOUSE

2. In connection with the suggestion that a spouse should be entitled by law to know the earnings of the other spouse, there was almost unanimous opinion in this Association that such a legal provision would not help to establish equality or to stabilise marriage. Further legal safeguards do not in the opinion of our members make for security or happiness in marriage and emphasis on its financial aspects with appropriate legal rights to each party would, they feel, add to domestic friction.

3. It is agreed, however, that in case of a breakdown of marriage there should be a right to apply to court for this information to be obtained. This is not intended as a reply to the final sentence of paragraph 4 of the enquiry, but as an independent contribution to the discussion. In fact the right already exists for the court in domestic proceedings to obtain information about means of the parties and we think that is an adequate provision and would emphasise that even so this right should remain in the hands of the court and the information be obtained through the probation officer or, should other recommendations be made by the Commission, through the probation officer or court welfare officer attached to the court in which this power will then vest.

#### PROPERTY RIGHTS OF HUSBAND AND WIFE

*Savings and purchases from housekeeping money*

4. Opinion within this Association is strongly in favour of the suggestion that in the absence of clear proof to

the contrary savings from housekeeping money and property purchased from such savings should be the joint property of the husband and wife. A minority view was expressed in favour of such savings being regarded as the possession of the wife.

5. It was felt that any court order in the matter should be made only if there was a breakdown in agreement about joint ownership or division of property which should be regarded as jointly owned. Members asked us to remind the Royal Commission of the value of calling in the probation (or court welfare) officer even in such disputes as action at that stage has in some cases led to conciliation.

#### Tenancy of matrimonial home

6. Opinion within the Association was more evenly divided on this; the heavier support was for the general recognition of joint tenancy but there was considerable support for the allocation of tenancy rights by the court at the time of separation or divorce in the knowledge then available to the court of all the circumstances of the case, including the welfare of the children and also the interests of the landlord who should have the right to be heard by the court making a decision.

#### Ownership of matrimonial home

7. There was general support for the idea as outlined by the Royal Commission—namely, that in the absence of explicit information to the contrary (e.g., a marriage settlement) the matrimonial home and contents should be regarded as joint property and that the court, in case of separation or divorce, should make an appropriate allocation. Again emphasis was laid on concern for the welfare of the children.

8. In connection with these latter matters we would point out that our views were expressed in the original statement of evidence submitted 31 January, 1952, *Minutes of Evidence 11, Paper No. 31, paragraphs 38 to 42.*

9. We would add that in the case of separation proceedings the importance of care in settling matters of tenancy and property emphasises, in the opinion of our members, the need for separate courts as suggested in our original evidence paragraphs 48 *et seq.*

## PAPER No. 139

### LETTER RECEIVED FROM THE SECRETARY OF THE NATIONAL CITIZENS' ADVICE BUREAU COMMITTEE

16th July, 1953.

1. You will be aware that the National Council of Social Service have remitted to the National Citizens' Advice Bureau Committee the questions raised in your letter of 8th June, since it would not have been possible at the time allowed to consult the National Council's Executive Committee nor to obtain any concerted view from the many national organisations of which the Council is composed.

2. I have been able to consult my own Committee who have agreed that we should do our best to help the Commission with an expression of opinion on the points raised. At the same time, they would like me to point out that time has not permitted us to obtain the views of the 500 Bureau which the Committee represents, nor is it thought that we would have been able to obtain a unanimous opinion on any of the points raised in view of their controversial nature.

3. In the circumstances it was felt that our most helpful course would be to convene a small group of experienced Bureau workers and members of the National Committee, who would be able to express their view based on long experience in this particular field of social work and supported by evidence from a representative group of Bureaux whom we have been able to consult.

4. With those reservations we hope that the views of our group may be of some help to the Royal Commission. They are as follows:—

#### INFORMATION AS TO THE FINANCIAL POSITION OF A SPOUSE

5. The group are of the opinion that any attempt to enforce disclosure by law while the husband and wife are living together would be unwise and might well produce

additional causes of friction between marriage partners when the matter might otherwise not have arisen.

6. The group share the view that the financial position of a man and his wife should normally be known to each other since it is on this basis that the most satisfactory planning of the joint income and the right marriage relationship is achieved. It is their experience that hardship is often suffered by a wife where a fair proportion of the husband's income is not made available for house-keeping expenses and that a sense of grievance is produced which may have an adverse effect on the stability of the marriage. They consider, however, that the power to enforce disclosure would only be of value in conjunction with the power to order an apportionment of income; and they have not sufficient evidence to enable them to say whether the law should be so amended as to enable the court to compel an adequate payment to be made in cases where parties are living together.

7. The group were unable to see in what way the principle of equality of rights and obligations as between husband and wife would be demonstrated by legislation on this point. On the contrary, they were of the opinion that this is a subject which can only be dealt with by more and better education for marriage and family life as suggested by the National Council in their original evidence.

8. The group consider that if the courts are not already in a position to require a proper disclosure of the financial resources of either spouse when a matrimonial dispute is before them, all reasonable powers to obtain this information should be given to them.

#### PROPERTY RIGHTS OF HUSBAND AND WIFE

##### (a) Savings from the housekeeping money

9. The group are of the opinion that in the absence of proof of agreement to the contrary savings made from housekeeping money should be regarded as the joint property of the husband and wife; but that in the case of

any dispute the court should have the power to make such order respecting the allocation of savings as seems to be equitable and reasonable having regard to all the circumstances.

##### (b) Tenancy of the matrimonial home

The group are of the opinion that the court should have power in case of dispute to apportion the rights of the spouses in regard to the tenancy of the matrimonial home, and that this power should be extended to all cases of separation or divorce and should not be limited to cases where children are concerned, as was suggested in the National Council's original evidence. [See Paper No. 32, *Minutes of Evidence for the Thirty-First Day*.] If this is done the group do not appreciate the advantage of making the husband and wife joint tenants and consider that such an arrangement would raise unnecessary difficulties.

##### (c) Ownership of the matrimonial home, and/or its contents

The group are of the opinion that the contents of the matrimonial home should normally, and in the absence of any explicit or implied arrangement to the contrary, be deemed to be the joint property of the spouses (notwithstanding that the contributions of the husband and wife to their purchase may have been unequal) and that in the case of any dispute the court should have power to decide on the occupation of the home and on how the contents should be divided.

10. The group do not support the suggestion that the matrimonial home (in the sense of house-property) should be regarded as the joint property of the spouses.

11. They would like to draw the Commissioners' attention to a suggestion made by a number of Bureaux that such a question should be dealt with in the court concerned with the original matrimonial dispute in order that the parties should not be involved in a second action in another court.

### PAPER No. 140

## LETTER RECEIVED FROM THE GENERAL SECRETARY OF THE NATIONAL MARRIAGE GUIDANCE COUNCIL

25th June, 1953.

Copies of your letter of the 9th June were circulated to members of our Executive Committee before its meeting on the 17th June when there was a full discussion on the points you raise. As a result, I am now able to give you our views as follows.

#### INFORMATION AS TO THE FINANCIAL POSITION OF A SPOUSE

1. You will recall that in our first memorandum [see paragraph 28, Paper No. 15 *Minutes of Evidence for the Fifth Day*] we set out our view as follows:—

"In a satisfactory relationship the husband and wife should naturally know each other's income and financial state. We think, however, that this position can really be brought about only by education and social influences. We have considered whether there should be a legal right for each party to know the financial position of the other but have concluded against it, as it would, in any event, be difficult if not impossible to enforce."

This remains our view although there is some division of emphasis among us, now as in the earlier discussions.

2. In considering the possibilities set out in your letter, we have to envisage an unsatisfactory situation if one spouse is denying financial information to the other. In such an unfortunate situation, we consider it likely to intensify the difficulties if the aggrieved spouse can get the information by "going behind the back of" the other. We are therefore opposed to any provision for the aggrieved spouse to obtain any pay slip from an employer or any income tax return from the Inspector of Taxes. Still more would we oppose any application to the court for an order for disclosure, since this would be likely to exacerbate the already strained relationship between the parties.

3. However, we believe that the point could be substantially met in another way that we regard as desirable. If everyone in receipt of an income had to show the amount of earnings in an annual return, all married people might be required to get the other spouse to countersign this income tax return with some appropriate statement that the second spouse had seen the return.

4. It is true that occasionally some overhearing individual might require the spouse to give this signature without actually looking at the return; but, in these circumstances, the second spouse would probably be intimidated into foregoing any other means of learning the financial position of the other.

5. The chief merit of the proposal is that it would provide an automatic procedure in which it would not be necessary for one party to make any form of complaint which would in many cases put the other party on the defensive.

#### PROPERTY RIGHTS OF HUSBAND AND WIFE

##### Savings from housekeeping money

6. We support the proposal that, in the absence of clear proof to the contrary, savings made from housekeeping money, and furniture, etc., purchased from such savings, should be regarded as the joint property of husband and wife.

##### Tenancy of the matrimonial home

7. We support the proposal that, in the absence of any explicit arrangements to the contrary, husband and wife should be deemed to be joint tenants of the matrimonial home; and that in case of divorce or separation the court should have power if necessary to apportion the rights of the spouses in regard to the tenancy. We think that this applies with particular force to rent controlled property.

##### Ownership of the matrimonial home and/or its contents

8. We sympathise with the object of the proposals put forward in your letter but we think it may be necessary to distinguish between the ownership of the matrimonial home and the ownership of its contents.

9. There are such complexities in the law of real property that we do not feel competent to offer an opinion within the time available about joint ownership of the home. Where the contents of the home are concerned, we support the proposals for joint ownership subject to the courts having power to ensure that (in the event of separation or divorce) the spouse responsible for the care of any children should have a special claim on furniture and household goods that are needed for their upbringing.

## PAPER No. 141

STATEMENT RECEIVED FROM THE  
LONDON MAGISTRATES' CLERKS' ASSOCIATIONINFORMATION AS TO THE FINANCIAL POSITION  
OF A SPOUSE

1. In our view such a provision would not ensure a more secure foundation for marriage. It would tend to inflame against those feelings of mutual confidence, trust and respect which inspire and, in the majority of cases, sustain the matrimonial relationship. Generally, we believe that the law should not concern itself with happy marriages and we would be against the creation of any legal background to the natural love and affection which alone provide the most secure foundation for matrimony.

2. It is doubtful if acceptance of the proposed would prevent financial disputes. In the magistrates' courts we are concerned with wilful neglect to provide reasonable maintenance; the threat of exposure of the husband's income is unlikely to deter a man bent on evading his financial responsibility. In our experience most married couples, at least up to the happening of the event which brings them to court, know each other's income, or can provide sufficient information for a reasonably satisfactory assessment to be arrived at.

3. In cases of wilful neglect to maintain, the married woman's *ex parte* statement that she has received no maintenance for such and such a time usually suffices for the granting of a summons against the husband. We think it would be useful if, in considering such applications, the magistrate could be provided with reliable information about the earnings of both parties. One result would be that the issue of unnecessary summonses (e.g. where the husband is unemployed and the wife does not know this) could be avoided. To this extent we would support a proposal that the court should be empowered to obtain a certificate of the earnings of either party, with the safeguard that the information so obtained should not be disclosed to either of the parties except during the hearing of a summons for a maintenance order.

4. We view with disfavour the direct approach by one spouse to the employer of the other for information about earnings. We think it is too much to expect that such a facility would be used with reasonableness; it would provide a point of friction between the employer and the employee concerned and would intensify the breach between husband and wife, who are already presumably estranged.

5. A copy of the income tax return would be a guide to potential earning capacity but would hardly provide the up-to-date information necessary in cases of neglect to maintain.

6. Generally, we find that employers readily respond to a request for information about earnings when made by a responsible intermediary such as a probation officer.

No employer is obliged to furnish a wages certificate, but since co-operation is so readily secured on a voluntary basis it cannot be said that there is any great need for legislation to compel compliance, although a power to compel an employer to furnish such a certificate to the court would be useful.

## PROPERTY RIGHTS OF HUSBAND AND WIFE

## Savings from housekeeping money

7. It is our experience that in most cases which arise in the metropolitan magistrates' courts any savings there may have been have disappeared before the married woman applies for her summons, particularly in cases of neglect to maintain. Many women defer their application to the court until the last possible moment, or until they are referred to the court by the National Assistance Board. The Association perfects the suggestion that until a breakdown of the marriage the savings should be regarded as joint property of husband and wife, but that on the making of a maintenance order any such savings should form part of the property to be allocated by the court (see paragraph 10).

## Tenancy

8. Unfortunately, consideration of the tenancy involves the rights of a third party, the landlord. We confirm our view that the county court is the more suitable tribunal for determining the future of the tenancy. It is presumably open to a landlord to enter into a tenancy agreement with husband and wife as joint tenants, but we would not go so far as to say that husband and wife should be deemed to be joint tenants when only one is in fact the tenant.

## Ownership of matrimonial home and contents

9. With regard to chattels, the Association agrees that these should be regarded as joint property until the court orders otherwise; it would be open to the court on the making of a maintenance order to say what effect should be given, for example, to a claim by one party to wedding presents received from friends of the other; likewise how far unequal contributions to the purchase of the home should affect the order of the court.

10. We confirm the view expressed in our memorandum and in the oral evidence given before the Commission [see *Minutes of Evidence for the Thirty-third Day*] that the magistrates' court should be given power to decide questions under this heading if the parties cannot do so for themselves and that a magistrate's order should be binding and therefore in substitution for what otherwise would be an order of the county court judge under the Married Women's Property Act, 1882, Section 17.

(Received 9th July, 1953.)

## PAPER No. 142

LETTER RECEIVED FROM THE SECRETARY OF THE  
LAW SOCIETY OF SCOTLAND

4th July, 1953.

1. In formulating the following observations on behalf of the Society the Council has listed the proposals with reference to the following questions:—

(1) Whether professional experience supports the proposer's account of the evil sought to be remedied?

(2) Whether the adoption of the proposals would be likely to effect a remedy?

(3) Whether the proposals infringe any valuable legal principle?

(4) Whether the proposals are practicable and capable of being applied generally?

(5) Whether the adoption of the proposals would have effects reaching beyond relations between the spouses so as to affect third parties?

2. Dealing with the proposals in turn the following observations fall to be made:—

INFORMATION AS TO THE FINANCIAL POSITION  
OF A SPOUSE

3. It appears to be implicit in the argument submitted in favour of the proposal that financial disputes are a frequent cause of the breakdown of marriages. The experience of the legal profession indicates that, while domestic disharmony frequently manifests itself in financial disputes, such disputes are seldom the real cause of the trouble. Further, there is considerable force in the suggestion that the result of an exercise of the rights envisaged in the proposals would be to produce domestic disharmony or, as would be more likely, to aggravate an already unhappy relationship. The proposal to give to one spouse the right to obtain a copy of the other's pay slip is limited in its application to wage-earners and salaried employees. The same may be said of the proposed right to obtain a copy of the income tax P.A.Y.E. certificate. Except possibly where income tax is assessed under Schedule E and certain

cases of Schedule D, a copy of an income tax return would convey information which would be available for purposes other than the assessment of income tax, and might, indeed be misleading. In any event, the information obtainable under these proposals would act as sufficient to give a proper view of a person's financial position, since it would be directed almost entirely towards income and convey little or nothing as to liabilities or investments. The proposed right to apply to the court for an order for disclosure would be likely to be exercised only after a breakdown of the marriage and with reference to a claim for alimony. In such circumstances the existing powers of the court are adequate.

#### PROPERTY RIGHTS OF HUSBAND AND WIFE

##### Savings from housekeeping money

4. It is noted that the proposals are intended to apply during the subsistence of the marriage and on its breakdown by divorce or separation, nothing being said about the position on the dissolution of the marriage by death. This apparent omission no doubt arises from the fact that the Commission's terms of reference exclude consideration of questions relating to the property rights of spouses on death. Nevertheless, it is important to keep in view the effect which the proposals under this and the following headings would have on the succession to the funds and property in question. It is noted also that the proposals that savings should be deemed to be the sole property of the wife or the joint property of the spouses pay no regard to responsibility for the breakdown of the marriage. If the foregoing factors are borne in mind, the proposal that such funds should be regarded as the sole property of the wife scarcely merits consideration. So far as regards the proposal that such funds should be deemed to be joint property and the alternative proposal that the court should have power to allocate savings, it is suggested that during the subsistence of the marriage no difficulty arises, and that on divorce the situation is simple, and better, covered for by the recommendations contained in the Mackintosh Report. The only situation in which there is likely to be any unfairness is where one spouse is forced to separate from the other through the fault of the latter and where (e.g., for conscientious reasons) the remedy of divorce is not open to the former. Even in such cases, however, the injured spouse has the right to alimony.

##### The matrimonial home and its contents

5. The experience of the legal profession confirms that hardship can be and is sometimes suffered by an innocent wife, where she has the care of young children, through being ejected from or forced to leave her home. The danger, however, is that in trying to cure some injustice

others may be created. The proposal that in cases of divorce and separation the court should have power to determine the rights of spouses in regard to tenancy would interfere with the legitimate rights of the owner, who might reasonably object to the obligatory transfer of a tenancy from a husband to a wife who might be unable to assume the contractual obligations involved. (There is, of course, provision in the Rent Acts for similar obligatory transfers of rights of possession from a deceased tenant to his widow or to certain members of his family, and it is a matter for consideration whether there should be any extension of this exception.) The adoption of the proposal that the matrimonial home and its contents should be regarded as the "joint property" of the spouses would be fraught with difficulties, whether "joint property" is really intended, or whether, as is more likely, it is a "common property" that is intended. (There are material differences in Scots law between rights of joint property and rights of common property.) It is suggested, in any event, that in the circumstances envisaged by these proposals, rather than rights of property that are imperfect rights rather than rights of property that are imperfect rights, it is of property (with certain obligations to it) as is matrimonial which a successful spouse might be unable to fulfil. In many cases the adoption of the proposal would adversely affect the legitimate interests of third parties, namely, lenders (e.g., in the case of a house a building society, and in the case of furniture a finance company through whose agency it may be held on hire-purchase or deferred payment terms). It would require to be borne in mind that it frequently happens that a dwellinghouse is held as security for advances made to a man for the purpose of his business and a transfer of ownership to his wife would in these circumstances cause difficulties which will be obvious and which would adversely affect the wife as well as the husband. Due notice would require to be taken also of the cases where the occupation of living accommodation is necessary for the proper conduct of a business (e.g., a farm). Further, the absence of an indication as to what factors the court should take into account in exercising the proposed powers would impose upon the court an unduly onerous duty and would possibly introduce a trend of development not contemplated by the proposals. The reference to "explicit arrangements to the contrary" seems to suggest a return to an era when antipathetic contracts of marriage were fashionable and when there was an undesirable pre-occupation with property rights. Finally—also applicable to the proposal that the home and its contents should be deemed to be "joint property"—are the observations made under the previous heading regarding ultimate succession and the recommendations of the Mackintosh Report as to the division of property on divorce.

#### PAPER No. 143

### STATEMENT OF VIEWS OF THE NATIONALISED INDUSTRIES

#### INFORMATION AS TO THE FINANCIAL POSITION OF A SPOUSE

1. The Nationalised Industries are all strongly opposed to the proposal that either spouse should be able to obtain a copy of the other spouse's pay slip from that spouse's employer.

2. They regard, as a general rule, the salary or wage paid to an employee as confidential and do not disclose it to the spouse. Exceptions to this rule are when the information is needed by a Public Body in connection with an application to it; by a public officer, such as a court probation officer; or when the party seeking the information has power to require it under subpoena in connection with pending legal proceedings. Method (a) in its present form would bring employers too much into the private affairs of their employees and would place an obligation on employers which is bound to endanger good industrial relations. No employee would like to think that a wages clerk (who may be a colleague) or his superiors are aware of the fact that his wife mistrusts him to such an extent that she exercises her rights under the law and has applied to the employer for details of his earnings. Similarly no woman is likely to be happy in the thought that her

husband had exercised his legal right and demanded from her employer details of her earnings.

3. If spouses are to be given the legal right to obtain information about each other's income the National Civil Board think it would be better, as proposed in method (A), to place the obligation of giving the information on the Inspector of Taxes who has information about a person's income from all sources rather than on the employer who only knows what wages he pays to the person. The Inspector of Taxes also knows whether a person has claimed the marriage allowance as supporting a spouse. If method (A) finds favour it might be thought fair that it should only operate where the person about whose income information is sought has claimed this allowance. The Board consider that a proper payment should be made by the person seeking this information as in the case of people seeking information from companies or the Companies' Register.

4. The other Boards feel that if there is good reason why the earnings of either spouse should be disclosed to the other this can more appropriately be done by giving power to a court of summary jurisdiction to demand from the employer the necessary information which can then be passed to the applicant by the court in an informal manner.

(Dated 4th July, 1953.)

## PAPER No. 144

STATEMENT RECEIVED FROM THE BRITISH EMPLOYERS' CONFEDERATION  
INFORMATION AS TO THE FINANCIAL POSITION  
OF A SPOUSE

1. The Royal Commission on Marriage and Divorce, by letter of 6th June, 1953, has invited the views of the Confederation on a proposal which has been made to the Royal Commission that each spouse should be entitled by law to be informed of the financial position of the other and on various suggested methods for implementing that proposal.

2. The Confederation has accordingly consulted its members on the matter, and the following statement has been prepared by the Confederation in the light of the replies which it has received from its members.

3. The general question as to whether each spouse should be entitled by law to be informed of the financial position of the other is one that falls outside the Confederation's purview. The Confederation therefore proposes to offer no observations on the general principle or on the suggested methods for giving effect to it which do not involve the employer, but to confine its comments to the suggestion made to the Royal Commission that either spouse should be entitled to obtain a copy of the other's pay slip from the employer.

4. The Confederation would point out that, although it is common practice for employees to be provided with a pay slip by the employer, this practice is by no means universal, and the Confederation would be opposed to its compulsory extension.

5. With regard to the merits of the suggestion that, in cases where pay slips are provided, either spouse should be entitled to obtain a copy of the other's pay slip from the employer, the Confederation considers that the earn-

ings of an individual employee are essentially a personal matter between him and his employer and that the disclosure by the employer to any third party of information relating to the earnings of an individual employee without the consent of that employee would be most undesirable. The particular suggestion that information as to earnings should be disclosed to the spouse of an employee would appear to the Confederation to have particularly undesirable features. By bringing the employer into the sphere of the workers' personal affairs, it would inevitably be resented by the workers and would be bound to have an adverse effect on the normal relationship between employers and their workpeople and an unfavourable reaction upon industrial relations.

6. It is clear furthermore that the suggestion would entail practical difficulties. In order to establish the legal entitlement of a claimant to a copy of a pay slip, the employer would presumably have to call for evidence of the marriage. This would inevitably involve a serious risk of friction between the employer and his workpeople. In addition, it could also expose the employer to the risk of the inadvertent disclosure of information to a person who was not legally entitled to it.

7. It is also clear that the suggested method would entail a substantial increase of work for the employer which would at best be unproductive.

8. In the whole circumstances, the Confederation desires to record its strong opposition to the suggestion, which it considers could only be prejudicial to the interests of employers and their workpeople and to the maintenance of good industrial relations.

The Confederation therefore trusts that the Royal Commission will reject the suggestion.

(Received 7th July, 1953.)

## PAPER No. 145

LETTER RECEIVED FROM THE SECRETARY OF THE  
PARLIAMENTARY COMMITTEE, CO-OPERATIVE UNION LTD.

26th June, 1953.

1. You wrote to me on the 6th June regarding a suggestion made to the Royal Commission that each spouse should be entitled by law to be informed of the financial position of the other. This matter has been considered by my Committee, and I am instructed to send you the following observations:

INFORMATION AS TO THE  
FINANCIAL POSITION OF A SPOUSE

2. The material question would be the validation of the authority of the individual who seeks information as to the "spouse's" financial position; if the employer is to accept the onus of proof how would he be safeguarded in the event of action being taken against him for divulging information to a person not entitled to it.

3. A copy pay slip or the provision of a copy of income tax return or P.A.Y.E. certificate would not give the financial position; the first would only give one week's wages, a P.A.Y.E. certificate would give only one year's wages. The spouse may have other sources of income not necessarily disclosed by a copy of the income tax return, for example, interest on War Savings Certificates, interest

on C.W.S. Bank Deposit Notes (except in the year in which the notes mature), capital that does not produce a taxed dividend, etc.

4. Administratively, we do not think the provision of information concerning wages would present any serious difficulty, although it would be something of an imposition if such information had to be supplied weekly, especially if it had to be delivered, say, by post.

5. Apart from the somewhat obscure legal position, the fact that any information supplied might be incomplete, and the imposition of extra work, and, possibly, more expense, there is the point that such legislation would publicise to the employer the domestic and private affairs of an employee, and we would be reluctant to recommend anything which tends to mix the private affairs of an employee with his business life.

6. A large proportion of the country's workers are governed by National Wages Agreements, the general provisions of which are known, and it should not be difficult to estimate with reasonable accuracy, in the case of such workers, the approximate earning capacity.

## PAPER No. 146

STATEMENT OF VIEWS OF THE FREE CHURCH FEDERAL COUNCIL  
INFORMATION AS TO THE FINANCIAL  
POSITION OF A SPOUSE

1. The Baptist Union of Great Britain and Ireland states:—

"We do not favour the proposals that each spouse should be legally entitled to be informed of the financial position of the other. We do not think it possible to promote by legislation of this kind the concord which there ought to be between husband and wife. On the contrary, we feel that such legislation would probably prove a cause of friction.

We think there might be something to be said for providing clerics to magistrates with definite power to obtain information about the financial position of both parties when the proceedings have actually come into court, but this is rather different from the question raised in the letter from the Royal Commission so we have not gone into this exhaustively."

2. The Presbyterian Church of England has not officially discussed the points you raise, but its representative after consultation with colleagues gives the following personal information:—

"I find it difficult to see how any of the proposals set forth in the letter would have the effect of putting marriage on a more secure foundation, or to save marriages from foundering on the rocks of financial disputes. It is admitted that the existence of the right of either spouse to ascertain the income of the other by any of the methods set forth in the letter might serve as a deterrent in future marriages against the practice of withholding full information. But over against this possible advantage, there seem to be serious objections to the proposals.

(1) If marriage is to be a partnership based upon equality, it can only be truly realised as such by the exercise of mutual trust. The exercise of the rights which the proposals would confer upon the spouses would seem to be the negation of this mutual trust.

(2) Where a marriage is being imperilled through the withholding of information by either partner regarding income, the resort to acquisition of the information by the methods set forth in the proposals would appear to have the effect of exacerbating the situation rather than helping it.

(3) The proposals if implemented would appear to have the effect of destroying that quite legitimate individuality and freedom of action so necessary if an equal partnership is to be full and complete. There may be reasons, good in themselves and not in the least detrimental to the marriage bond, for withholding such information; and to appear to discourage such freedom of action on the part of the parties to a marriage could have the effect of rendering it less rich than it might otherwise become."

3. *The Secretary of the Congregational Union of England and Wales* says:—

"My own judgment is that it would be a mistake to make knowledge of the financial position of the partner in marriage enforceable by law."

He is however having further consultation with a Congregational expert on these matters.

4. *The Moravian Church* states:—

"We have considered the suggestions contained in this letter and we must say quite frankly that such suggestions are not ones which we could support. It appears to us that if a man and woman entering matrimony do so in the attitude of mind which such suggestions presuppose then nothing can prevent such a marriage from deteriorating into something far other than what the Church regards as true marriage. To give either spouse the right to check up on the other's earnings in our view would rather tend to increase domestic friction than to lessen it."

5. *The Churches of Christ, Great Britain and Ireland, [The Social Questions Committee]* states:—

"That we accept that there be legislation compelling—under certain circumstances—one spouse to declare his or her financial state to the other.

"That we accept—in cases of domestic strife—clause (b) 'That either spouse should be entitled to obtain from the appropriate Inspector of Taxes a copy of the other spouse's income tax return or P.A.Y.E. certificate'.

We do NOT accept (a) 'That either spouse should be able to obtain a copy of the other spouse's pay slip from that spouse's employer.'

It was also unanimously agreed that in cases where clause (b) is not appropriate 'then a court order to disclose should be obtained.'"

6. *The Secretary, the Department of Christian Citizenship, the Methodist Church*, states:—

"In the Methodist Church we sustain the view that it is a condition of marital good relations that a wife should know what her husband earns (and vice versa), and that there should be frankness and good understanding between the partners in regard to the finances of the home.

We have made no pronouncement on the question of making this knowledge a right in law. We judge that in the great majority of cases common sense dictates the wisdom of the partners sharing knowledge of each other's earnings. The law should only be invoked to deal with the cases where manifest injustice is done by the withholding of the necessary information.

I would venture personally the judgments:—

(1) that there is a good case for establishing the right in law of either partner to know the earnings of the other;

(2) that in the forms proposed, in (a) and (b) I think the method of either spouse being entitled to apply for the information either to the employer or the other partner or to the Income Tax authorities, is unsatisfactory since it throws the onus of action on the supposedly suffering party;

(3) that, therefore, a better method would be for application to be made to the magistrates' court, who should then, through the probation officer, seek the information, and convey it to the partner desiring it. This method would have the merit of giving the sanction of law to the application, and with the general procedure of the courts in dealing with matrimonial causes, he assured of sympathetic handling. It would also have the advantage of giving an opportunity of bringing the defaulting partner to book."

(Received 10th July, 1933.)

## PAPER No. 147

### LETTER RECEIVED FROM THE HONORARY SECRETARY OF THE JUSTICES' CLERKS' SOCIETY

16th June, 1933.

#### INFORMATION AS TO THE FINANCIAL POSITION OF A SPOUSE

1. In its evidence and memoranda the Justices' Clerks' Society endeavoured to confine itself to matters directly affecting magistrates' courts, and the suggestions referred to in your letter of 6th June appear to move into a wider field. The views set out below may represent the views of such members of the Council as I have been able to consult in the time available.

2. If the proposed suggestions are that a spouse should be able to obtain as of right a copy of the other spouse's pay slip, or a copy of his or her income tax return or P.A.Y.E. certificate while cohabitation still continues and no legal proceedings are pending, we are not attracted by them. It is true that financial troubles often play a large part in matrimonial cases, but such troubles are really symptoms of deeper matters. We doubt if the ability of one spouse to flaunt a knowledge of the other's income will do anything to save a marriage from "foundering

on the rocks", but think it is more likely to aggravate the position. What is needed is a cure for selfishness, extravagance, and the love of pleasure, and this cannot be achieved by statute.

3. On the other hand, if the suggestions are intended for use in proceedings in magistrates' courts, we consider them almost equally unattractive. The court is concerned with the potential, not the actual, income of a defendant—see for example *Koraszew v. Koraszew* (1896) P. 160. Employers are usually co-operative, and certificates of wages can be obtained and used under Section 60 of the Magistrates' Courts Act, 1932. Even if reliable evidence is not available, a lay bench, with its knowledge of local conditions, invariably possesses the ability to assess the defendant's potential earning capacity, or to test the value of such evidence as is produced. Any provisions on these lines would be comparable with Section 60 of the Magistrates' Courts Act, 1932—attractive on paper, but of little use in practice.

## PAPER No. 148

LETTER RECEIVED FROM THE CENTRAL SECRETARY OF THE  
MOTHERS' UNION

25th June, 1953.

INFORMATION AS TO THE FINANCIAL  
POSITION OF A SPOUSE

1. The Mothers' Union does not wish to support the proposals set out under paragraph 1 of your letter.

2. We should, however, like to support any recommendation for the abolition of the present system by which the wife's earnings or separate income is reckoned to be the husband's, so that the joint incomes are assessed at a higher rate than if each were assessed separately.

## PAPER No. 149

LETTER RECEIVED FROM THE GENERAL SECRETARY OF THE  
TRADES UNION CONGRESS

26th June, 1953.

INFORMATION AS TO THE FINANCIAL  
POSITION OF A SPOUSE

1. I brought your letter of the 6th June asking for the views of the Trades Union Congress on the suggestion that each spouse should be entitled by law to be informed of the financial position of the other, to the notice of our General Council at their meeting on Wednesday.

2. You will remember that you wrote to us in March, 1952, asking for our views on a suggestion that moneys due to wives or ex-wives under court orders should be recoverable by deductions from the wages of the defaulter.

We then said that we thought that it would be wrong to impose upon an employer an obligation of that kind in respect of a matter which does not arise from, and has no obvious relationship to, the man's employment. We think the same considerations are equally applicable to the first of the methods you mention of implementing the suggestion put to you, namely, that either spouse should be able to obtain a copy of the other spouse's pay slip.

3. We have no comments to offer on the alternative methods of implementing the suggestion.

## PAPER No. 150

LETTER RECEIVED FROM THE GENERAL SECRETARY OF THE  
WOMEN'S CO-OPERATIVE GUILD

21st July, 1953.

INFORMATION AS TO THE FINANCIAL  
POSITION OF A SPOUSE

1. I have now made an enquiry amongst officials of my organisation. Although the enquiry was, necessarily rather limited in scope the result can be taken as the general view of the Women's Co-operative Guild, since the officials are fully conversant with the opinions of the members.

2. It was generally felt to be extremely desirable that provision should be made to enable either spouse to know the income of the other but there was considerable doubt about the practicability of the methods suggested.

3. In the opinion of the Women's Co-operative Guild marriage should be a legal partnership and if this were the case there would be a legal remedy for any failure to keep the contract.

### PART III

## ATTACHMENT OF WAGES

(NOTE.—A number of organisations were asked to give their views on proposals made in the Commission for the introduction of a system of attachment of wages as a means of enforcing orders for maintenance. The letter which was sent on behalf of the Commission and the replies thereto are reproduced below.)

#### PAPER No. 151

#### LETTER SENT ON BEHALF OF THE COMMISSION

24th March, 1952.

1. One of the proposals to which the Commission will wish to give careful consideration, is that, in view of the difficulty which many wives and ex-wives, particularly those in poor circumstances, are liable to experience in obtaining moneys due to them under court orders for the payment of alimony or maintenance, such orders, when disobeyed, should be enforceable by deduction from the earnings of the defaulter or from other moneys due to him. The Commission's attention has been drawn to the fact that, every year, a large number of men are imprisoned for disobedience to such orders.

2. Among the suggestions which have been made as to the method by which such deductions could be made were the following:—

(a) There should be introduced in England a procedure corresponding to the Scottish procedure known as "arrestment". Under that procedure, which is somewhat similar to, though apparently much more widely used than, the English procedure known as "attachment", the successful pursuer in an action can arrest in the hands of a third party any money (including wages) or other movable property which may be due by that third party to the defaulter; and it is understood that the procedure is not infrequently invoked in actions for alimony, which are the Scottish equivalent

of English proceedings for maintenance or alimony. When the procedure is invoked the third party cannot make any payment to the defaulter and the latter usually authorises the payment of the arrested money to the pursuer. If, however, he refuses to do so, the pursuer is entitled to institute further proceedings, the costs of which are chargeable, along with the original debt, to the arrested money or property. It is understood that, in many cases, the knowledge that the procedure exists makes recourse to it unnecessary.

(b) Moneys due by way of alimony or maintenance under a court order, and persistently withheld, should be deducted from any moneys due to the defaulting husband or ex-husband from public funds or aggregated with any tax, National Insurance contributions or other moneys due from him. On it being certified that such deductions or aggregations were in force, a wife or ex-wife would be enabled to receive "advances" from public funds, through the Assurance Board, the Post Office or some other local agency, the necessary inter-departmental financial adjustment being effected later.

3. Before giving further consideration either to the principle of the proposal or to the method of its execution the Commission would be glad to receive any comments which the . . . may wish to offer.

#### PAPER No. 152

#### STATEMENT RECEIVED FROM THE BRITISH EMPLOYERS' CONFEDERATION

1. The Royal Commission on Marriage and Divorce, by letter of 24th March, 1952, has invited the views of the Confederation on a proposal that court orders for the payment of alimony and wife maintenance should, when disobeyed, be enforceable by the attachment of wages or other money, including that derived from public funds.

2. It would appear that attachment of debts has never been part of the common law of England and the practice was first introduced by the Common Law Procedure Act, 1854. Under this Act, the attachment of wages became possible, but in 1870 the Wage Attachment Abolition Act—the preamble to which referred to "the inconvenience" that had arisen from the attachment of wages—abolished the right of a creditor to attach the wages of any servant, labourer or workman.

3. The Confederation appreciates that in Scotland the procedure known as "arrestment" may be applied to wages and operated in cases of default under wife maintenance orders, and that it has been stated that the number of imprisonments in default of such payments is lower in Scotland than in England and Wales. It appears, however, to the Confederation that there are so many fundamental differences in the legal systems of the two countries—including the fact that in England and Wales imprisonment for default under a wife maintenance order extinguishes the debt, whereas in Scotland, where imprisonment can only take place if the default is wilful, it does not—that experience in Scotland cannot be taken as a reliable guide as to the effect which the introduction of the principle of attachment of wages might have in England and Wales.

4. The Confederation, after careful consideration of the whole matter, has come to the conclusion that the attach-

ment of wages would, by intruding the employer as an intermediary in the personal relations between the worker and his creditor, inevitably import into industrial relations an element of friction which would be inimical to the interests both of employers and their workpeople.

5. It is clear that the procedure for the attachment of wages could not be operated without the reason becoming known to the employer, and while it is impossible to say how far such knowledge might react detrimentally upon the worker's employment—which would no doubt vary in individual cases—the Confederation has no hesitation in saying that, in so far as such reactions should arise, they would constitute a real element of discord in industrial relations. It would also appear to the Confederation that the principle of the attachment of wages would not be acceptable to the workers themselves, and it is clear that to make the employer the instrument in the enforcement of a measure to which the workers themselves object would of itself inevitably be a source of constant friction.

6. It further appears to the Confederation that if the principle as to the attachment of wages were conceded in the case of alimony and wife maintenance orders it might well be applied at a later date to the recovery of fines and other debts.

7. In the whole circumstances, therefore, the Confederation is strongly opposed to the introduction of the principle of attachment of wages in regard to alimony and wife maintenance orders in England and Wales. In view of its objection to the principle, the Confederation feels it unnecessary to enter into the merits of the particular methods of operating that principle which are referred to in the letter from the Royal Commission.

(Received, 4th June, 1952.)

## PAPER No. 153

LETTER RECEIVED FROM THE ASSISTANT GENERAL SECRETARY  
OF THE TRADES UNION CONGRESS

28th April, 1952.

1. Thank you for your letter of the 24th March asking for comments on a proposal that court orders for the payment of alimony or maintenance should be enforceable by deduction from moneys due to the defaulter, including his earnings.

2. The General Council discussed your letter at their meeting last week and I have been asked to tell you that they are opposed to the proposal in so far as it relates to deductions from earnings.

3. In coming to this decision the General Council are aware of the difficulty which wives and ex-wives have in many cases of obtaining the moneys due to them. We have no sympathy whatever with men who default in this way and we would have liked to have been able to come to another conclusion on the proposal put to you. It

would, however, in our view be wrong to impose upon an employer an obligation to make a deduction from the wages of any of his employees in respect of a matter which does not arise from and has no obvious relationship to the man's employment.

4. The Royal Commission will no doubt be aware that deductions from wages have often been a source of industrial unrest and Acts of Parliament have had to be passed to impose strict limits on the kind of deductions which can legally be made.

5. It is because of the effect the proposal would have upon relationships between employers and workmen and not from any desire to ignore the difficulties which have led to the proposal that we are compelled to oppose it.

## PAPER No. 154

## STATEMENT OF VIEWS OF THE NATIONALISED INDUSTRIES

The Nationalised Industries consider that the suggestions should be opposed. They are of opinion generally that the relations between employer and employee would be impaired by the introduction of any system involving deductions from earnings in respect of payments due under a maintenance order. This would be regarded by employees as an interference in their private affairs and there is a tradition in British industry that the private affairs of

an employee are of no concern to the employer unless an action of the employee is detrimental to the business of the employer. Other reasons for opposing the introduction of a system of attachment of wages are that the work of collecting money for third parties, e.g., income tax, State insurance, is already considerable and it is undesirable to add to this work, apart from the expense involved.

## PAPER No. 155

LETTER RECEIVED FROM THE SECRETARY OF THE  
PARLIAMENTARY COMMITTEE, THE CO-OPERATIVE UNION LTD.

28th April, 1952.

1. Your letter of the 24th March was considered very carefully at a meeting of the Committee last Thursday.

2. The Co-operative Movement would not raise objection to an extension of the Scottish "arrestment" procedure to England and Wales.

3. The Scottish Co-operative Wholesale Society, one of the largest, if not the largest, employers in Scotland, reports that no difficulties have arisen.

## PART IV

### QUESTIONS OF LAW OF EXCEPTIONAL PUBLIC INTEREST

(NOTE.—In its Final Report (Cmd. 8878, 1953), the Committee on Supreme Court Practice and Procedure recommended the adoption of a scheme for litigation at public expense whenever a point of law of exceptional public interest was involved (paragraphs 640-669). There was a difference of view among members of the Committee concerning the application of the scheme to matrimonial cases and finally the Committee made no recommendation in respect of that aspect but reserved it for consideration by the Commission (paragraphs 670-676). The memoranda reproduced below were received from two members of the Committee and set out the different points of view.)

#### PAPER No. 156

#### MEMORANDUM SUBMITTED BY MR. GERALD GARDINER, Q.C.

1. It is understood that the Committee on the Procedure of the Supreme Court will recommend that, in order that points of law of public importance may be decided, the Attorney-General should be entitled to assist a party or parties to appeal at the public expense or, if neither party desires to appeal, to appeal himself. In the latter case the result of the appeal would not, of course, be binding on the parties: the Attorney-General would in effect merely use the facts of the case to obtain in, for example, the House of Lords a clarification of the law on a point of public importance as, for example, where a decision of the Court of Appeal has stood for some years but is widely thought to be wrong but no one has been able to afford to take the point to the House of Lords.

2. It is considered whether or not to make a similar recommendation in matrimonial cases, substituting the Queen's Proctor for the Attorney-General, but providing that, if neither party desired to appeal and the Queen's Proctor added himself as a party for the purpose of appealing against the wishes of the parties, the result of the appeal should bind the parties on the ground that in matrimonial cases the wishes of the parties must be subservient to the public interest.

3. As there was disagreement on the matter, the Committee decided to make no recommendation but thought the point a proper one to refer to the Royal Commission on Marriage and Divorce for their consideration.

4. The disagreement related to two points:—

(i) The Queen's Proctor and others felt that the question of such an appeal was likely to arise so seldom that it would not be right to make special provision for it.

(ii) The second point, to which alone this Memorandum is directed, was that even if the proposal was accepted in principle, where such an appeal was against the wishes of both parties, the result of the appeal ought not to be binding upon them.

5. I suggest that to enable a State official to force an appeal on the parties in a matrimonial suit and make the result binding on them would be an unwarrantable interference with the liberty of the subject. I am hopeful that four illustrations may make my point plain:—

(i) A public man petitions for dissolution and fails. Because he is a public man the judgment is widely reported in all its details in the popular Press. He is advised by his Counsel that the decision was wrong and would be reversed by the Court of Appeal. But he says, "No. I have got two boys at a public school. The publicity must have been awful for them. If I had known that the case would receive all this publicity

I would never have started it until they had left school". But the Queen's Proctor then says, "This case raises a point of law of public importance and if you do not appeal I shall, and if it is all in the papers all over again I cannot help that".

(ii) Two judges of the Division in the same week decide the same point in different ways, the first case not having been reported when the second one was heard. No party wants to appeal but the Queen's Proctor says, "This is very unsatisfactory. I must take one case or the other—it does not matter which—to the Court of Appeal to obtain an authoritative decision". To the Queen's Proctor it does not matter which case he takes. He might well toss up. But to the four or more parties involved, their whole future lives may depend on how the coin comes down if the result of the appeal is to bind them against their wishes.

(iii) A husband petitions for dissolution and fails. As a result of the hearing he realises several things which he had not realised before and there is a reconciliation and the family are now all living happily together again. But the Queen's Proctor says, "The judge's refusal to grant a decree in this case raises an important point of law and I am going to appeal and to insist that the petitioner must be granted his decree".

(iv) Wives sometimes refuse to divorce their husbands but change their minds when they know that the other woman is going to have a baby so that, as long as a decree is obtained before the child is born, it may be born legitimate. If in such a case the Queen's Proctor can insist on appealing against the wishes of the parties, the decree may not be made absolute until two years later when the House of Lords may uphold the judge's decision. In such a case all that the Queen's Proctor has done is to bastardise a child.

6. English men and women have never been forced to take matrimonial proceedings if they did not want to and it is respectfully submitted that the proposal made would be a grave interference in a field in which individual and personal matters of vital importance to the individual are concerned and that the desire of lawyers to have interesting points of law decided does not provide sufficient justification for it.

7. If the Royal Commission takes the view that the Queen's Proctor is an anachronism which should now be dispensed with, the question would not arise. Even, however, if he continues to exist, and even if the proposal in its general form were adopted, it is not, it is suggested, necessary to depart from the view taken in the case of all other forms of proceeding, namely, that if the Attorney-General decides to appeal against the wishes of the parties, the result should not be binding on them.

(Dated 9th April, 1953.)

#### PAPER No. 157

#### MEMORANDUM SUBMITTED BY THE HON. MR. JUSTICE WILLMER

1. I have been invited to submit a memorandum upon the question whether the Queen's Proctor should be accorded increased rights of intervention in matrimonial cases, more particularly in cases which raise questions of law of exceptional public interest, so as to afford greater facilities for obtaining the decision of the Court of Appeal and the House of Lords in such cases. It is suggested that the questions which might be considered are:—

(a) Should the Queen's Proctor, in cases in which his assistance is required by the court under Section 10 (1) of the Matrimonial Causes Act, 1950, be given a right to intervene and become a party to the suit, with a consequent right to appeal and obtain on such appeal a decision binding on the parties?

(b) Alternatively, is it (i) possible, and (ii) desirable, that the Queen's Proctor should have a right to take a

consultative case on appeal to a higher tribunal, merely for the purpose of obtaining a decision clarifying the law, and without binding the parties?

2. By Section 10 (1) of the Matrimonial Causes Act, 1950, the court is enabled, if it thinks fit, to request the assistance of the Queen's Proctor to argue before the court any question which the court deems necessary or expedient to have fully argued. This section of the Act is frequently invoked by judges of the Probate, Divorce and Admiralty Division, especially in undefended cases, when any question of law of unusual importance or difficulty arises, and in such cases it enables the court to have the benefit of argument on both sides before arriving at a decision. But by ascending at the request of the court in pursuance of this section the Queen's Proctor does not become a party to the suit. Consequently, if the decision is in favour of the petitioner, the Queen's Proctor, even if he is of opinion that the decision is erroneous, is powerless to carry the matter further, because, not being a party, he has no right of appeal.

3. By Section 10 (3) of the Act, if the Queen's Proctor suspects that any parties to the petition are or have been acting in collusion for the purpose of obtaining a decree contrary to the justice of the case, he has the right, under the direction of the Attorney-General, after obtaining the leave of the court, to intervene in the suit, retain counsel and subpoena witnesses to prove the alleged collusion. Again, by Section 12 (2) of the Act any person, including the Queen's Proctor, may, after the pronouncing of the decree nisi and before the decree is made absolute, show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court. Where the Queen's Proctor acts under either of these provisions he becomes for all purposes a party to the suit; he may recover or be ordered to pay costs; and in the event of his being dissatisfied with the decision of the court he has the same rights of appeal as any other litigant.

4. It has always appeared to me to be something of an anomaly that, when the Queen's Proctor is called in to assist the court under Section 10 (1) of the Act, he should not be put in the same position, and accorded the same rights of appeal, as is the case when he acts under Section 10 (3) or Section 12 (2) of the Act. This is more particularly so, having regard to the fact that cases in which the assistance of the Queen's Proctor is requested by the court are precisely those most likely to raise questions of law of unusual importance, such as might well be thought appropriate for consideration on appeal. Cases in which the Queen's Proctor acts under Section 10 (3) or Section 12 (2) of the Act, on the other hand, commonly depend on issues of fact, the decision of which rarely gives rise to an appeal.

5. The curious result of the present procedure is that where the Queen's Proctor is called in to assist the court under Section 10 (1) of the Act, there is in effect a one-sided right of appeal. If after hearing the argument on behalf of the Queen's Proctor the court dismisses the petition, the aggrieved petitioner has his right of appeal to the Court of Appeal and (with leave) to the House of Lords. If, on the other hand, the court grants the petitioner a decree, that is the end of the case; for the Queen's Proctor, not being a party to the suit, has no right of appeal, and there is no way of challenging on appeal the decision of the court of first instance. This curious anomaly was the subject of some discussion in the Court of Appeal in the case of *Baxter v. Baxter* (1948) A.C. 274—a case arising out of an undefended petition for nullity, in which the Queen's Proctor was requested to attend for the assistance of the Court of Appeal. In the event, as it happened, the decision of the Court of Appeal was against the petitioner, who was granted leave to appeal to the House of Lords. That case, therefore, did actually go to the House of Lords, but had the decision of the Court of Appeal been the other way, there would have been no means of bringing the matter before the House of Lords. In that event I venture to submit that the public interest would have suffered—for the question at issue was eminently one that called for the decision of the highest tribunal.

6. In order to remedy this anomaly the suggestion was made to the Supreme Court Committee on Practice and Procedure that Section 10 (1) of the Matrimonial Causes Act, 1950, should be amended, so as to provide that, where the assistance of the Queen's Proctor is requested by the court for the purpose of arguing any question of law which the court deems it necessary or expedient to

have fully argued, he should have the right, where so directed by the Attorney-General, and with the leave of the court, to intervene and become a party to the suit. The effect of this suggestion would be to bring the procedure under Section 10 (1) into line with that under Section 10 (3), so that in either case the Queen's Proctor would have an equal right of appeal. I should myself strongly support this suggestion, which appears to me to be a necessary reform if the Queen's Proctor is to be enabled properly to discharge the duties imposed on him by Parliament. The members of the Supreme Court Committee on Practice and Procedure were not, however, able to come to any agreement on the matter, and made no recommendation beyond suggesting that the problem was one suitable for consideration by the Royal Commission on Marriage and Divorce.

7. It will be observed that the suggestion for conferring on the Queen's Proctor this additional right of intervention is subject to three limitations:—

(a) The case must be one in which the court, of its own motion, has asked for the assistance of the Queen's Proctor.

(b) The Queen's Proctor would only be entitled to apply for leave to intervene where so directed by the Attorney-General.

(c) There would be no right of intervention without the leave of the court.

It has not been suggested, and I would not suggest, that the Queen's Proctor should have any general right to intervene at will in a matrimonial case. It is also to be observed that the task of the Queen's Proctor, when he is called in to assist the court, is normally to present the case against the petitioner. If the Queen's Proctor succeeds, and the petitioner is denied relief, the latter may always appeal to the Court of Appeal. If, on the other hand, the petitioner obtains relief to which the Queen's Proctor considers he (or she) is not entitled, then, and only then, would the Queen's Proctor obtain a right of appeal under the suggested procedure. On such an appeal the Queen's Proctor would be concerned to show that the relief obtained by the petitioner in the court below was wrongly obtained. In no circumstances would it be the task of the Queen's Proctor to seek to bring about the dissolution of a marriage which the parties desired should be preserved.

8. I venture to stress the points made in the preceding paragraph, because it appears to me that much of the criticism directed against the suggestion put forward to the Supreme Court Committee on Practice and Procedure was based on a misapprehension as to what the suggestion really was. Some of this criticism is repeated in the memorandum submitted to the Royal Commission on Marriage and Divorce by Mr. Gerald Gardiner, Q.C., which I have had the advantage of reading and considering. In paragraph 5 of that memorandum Mr. Gardiner suggests that "to enable a State official to force an appeal on the parties in a matrimonial suit and make the result binding on them would be an unwarrantable interference with the liberty of the subject". I venture to submit that this criticism is misconceived. For the only case in which, under the suggested procedure, the Queen's Proctor could be said to "force an appeal on the parties in a matrimonial suit" would be where he considered that the petitioner had obtained in the court below some relief to which he (or she) was not in law entitled. If in such a case an appeal by the Queen's Proctor were unsuccessful the petitioner would not suffer, except to the extent of having to accept a delay of some weeks or months in obtaining the relief to which he (or she) was entitled. If, on the other hand, the appeal of the Queen's Proctor were to succeed, the petitioner would have no legitimate ground of complaint as being denied the fruits of a decree in the court below, which *ex hypothesi* the appellate tribunal must regard as having been obtained contrary to law. This, I submit, cannot fairly be described as "an unwarrantable interference with the liberty of the subject".

9. From the above explanation it should be clear that the first three of the imaginary illustrations put forward in paragraph 5 of Mr. Gardiner's memorandum are cases which could not possibly arise in practice. For under the suggested procedure the Queen's Proctor would acquire a right of appeal only in cases where his assistance had been requested by the court below, and where, as the result of an application directed by the Attorney-General, he had been granted leave to intervene. If the petition failed in the court below, this could only be because the Queen's Proctor's intervention was successful, and he would therefore have no grounds for appeal. In no circumstances

would it be the business of the Queen's Proctor to appeal for the purpose of obtaining the dissolution of a marriage against the wishes of the parties, or in a case where the court had already decided that the marriage ought not to be dissolved. In such cases it is inconceivable that the Attorney-General would direct an application to intervene, and certainly no court would ever grant leave.

10. The only one of Mr. Gardiner's illustrations which appears to me to have any reality in practice is the fourth. It must be accepted that to grant the Queen's Proctor leave to intervene, with a consequent right of appeal, would result, if his appeal were unsuccessful, in the petitioner being subject to some delay in obtaining the relief to which he (or she) was entitled. This, it is true, might conceivably result, in rare and exceptional cases, in bastardizing a child which might otherwise have been born legitimate. It may be considered, however, that this is a consequence which should occasionally be accepted in the larger public interest, on the footing that it is more important for the status of the parties to be properly determined according to law (if necessary by the highest tribunal) than that one *provo fidei* illegitimate child should gain the opportunity of being legitimated.

11. For the foregoing reasons I should be disposed to give an affirmative answer to the first of the questions put forward in paragraph 1 hereof. If it be objected that the cases to which the suggested procedure would apply might be expected to be very rare, I would answer that that is no reason for not providing a procedure available for use in such rare cases when they do arise. Every case in which the court requests the assistance of the Queen's Proctor for the purpose of arguing some question of law is at least potentially a case in which the present absence of any right of appeal on the part of the Queen's Proctor may give rise to difficulty, and may result in a wrong decision being left without possibility of challenge.

12. With regard to the second of the questions put forward in paragraph 1, I should not myself favour the introduction of a procedure for taking a consultative case on appeal to a higher tribunal without binding the parties. It must not be forgotten that every petition for divorce or nullity involves a question of status, and the court is not concerned only with the private rights of the parties, as is the case with ordinary civil litigation. The public interest is concerned in all questions of status, and so also are the interests of outside persons who are not parties to the suit. In these circumstances it appears to me that to allow a consultative case to be taken on appeal to a higher tribunal, for the purpose of obtaining a decision

which will not bind the parties, would lead to grave difficulties and undesirable consequences. The effect of the decision on appeal would be to determine what the status of the parties ought to be, and if that decision is at variance with the decision of the court below, it seems most undesirable to leave the status of the parties as erroneously determined by the latter. The validity of a subsequent re-marriage may depend upon whether the previous marriage was, or was not, properly dissolved. This in turn may raise questions as to the legitimacy of future children, and as to the relative rights of inheritance of the prior and subsequent spouses, as well as of the children of the respective marriages. It appears to me most undesirable that such matters should be left to depend upon the decision of the court below, which *ex hypothesi* must have been erroneous if the consultative appeal to the higher tribunal be successful.

13. One example will suffice to illustrate the kind of difficulty that I have in mind. Suppose that the Court of Appeal grants a decree dissolving a marriage where there are children. The Queen's Proctor, being of opinion that the decision of the Court of Appeal was wrong in law, takes a consultative case to the House of Lords and succeeds. This would mean that in law the marriage ought never to have been dissolved. But, the decision of the House of Lords not being binding on the parties, both parties re-marry on the strength of the erroneous decision of the Court of Appeal, and both have further children. In the event of either of the parties dying intestate his or her children, of both prior and subsequent marriages, would enjoy rights of inheritance. But if the decision of the Court of Appeal dissolving the prior marriage was erroneous, why should the children of the prior marriage be prejudiced by having to share with the children of the subsequent marriage, which, on a correct view of the law, ought never to have been allowed to take place?

14. It would be possible to multiply examples of a similar kind. But enough has been said to explain why I should view with considerable misgiving any proposal for taking a consultative case on appeal to a higher tribunal in a matrimonial cause without binding the parties. Nor would I regard any such proposed procedure as at all necessary in the public interest, provided that the Queen's Proctor were accorded the limited right of intervention and appeal in matrimonial causes proposed in paragraphs 2 to 11 hereof. But it is of the essence of this proposed procedure that the ultimate decision of the court, alike on appeal as now at first instance, should be binding on the parties, and should be conclusive as to their status.

(Dated 5th June, 1953.)